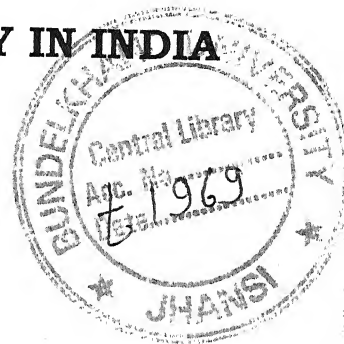


**HUMAN RIGHTS OF FEMALE WITH
SPECIAL REFERENCE TO
FEMALE FOETICIDE – A STUDY IN INDIA**



THESIS SUBMITTED TO
BUNDELKHAND UNIVERSITY, JHANSI

**FOR THE AWARD OF THE DEGREE OF
DOCTOR OF PHILOSOPHY IN LAW**

BY

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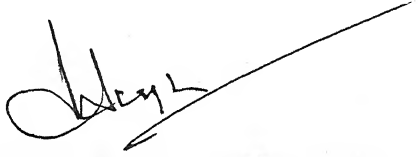
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C E R T I F I C A T E

This is to certify that the thesis entitled "**Human Rights of Female with Special Reference to Female Foeticide - A Study in India**" submitted in fulfillment of the requirements for the degree of **Doctor of Philosophy in Law** is a record of bonafide research carried out by **Mrs. Bindu Variath** at the **Institute of Law, Bundelkhand University, Jhansi** under by supervision and the manuscript is suitable for submission for the award of **Doctor of Philosophy in Law**.

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D E C L A R A T I O N

I **Mrs. Bindu Variath** hereby declare that the thesis entitled "**Human Rights of Female with Special Reference to Female Foeticide – A Study in India**" is prepared by me under the guidance and supervision of **Dr. J.D. Singh, Professor, Head, Dean and Director, Institute of Law, Bundelkhand University, Jhansi** and work was carried out at **Institute of Law, Bunderlkhand University, Jhansi.**

This is submitted to the Bundelkhand University, Jhansi, Uttar Pradesh in partial fulfillment of the requirement for the award of the degree of **Doctor of Philosophy in Law.**

I further declare that the thesis or any part thereof has not been previously submitted for the award of any degree or diploma.

Place : Jhansi

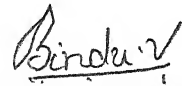

Bindu Variath

Date : 24, June, 2004

A C K N O W L E D G E M E N T

It gives me great pleasure to express deep gratitude to my respected teacher and guide, Dr. J.D. Singh, Professor, Head, Dean and Director, Institute of Law, Bundelkhand University, Jhansi for his unparallel and excellent guidance, constant inspiration and continuous encouragement during the course of my study and preparation of the thesis. I owe a great deal to him.

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BINDU VARIATH

Place : Jhansi

Date : 24, June, 2004

PREFACE

India is a land of diversities in terms of language, religion, ethnic group, racial varieties, culture etc. Geographically India covers a wide stretch, from Jammu & Kashmir in the north to Kerala and Tamil Nadu in the south, from Nagaland and Arunachal Pradesh in the East to Gujarat and Maharashtra in the West. There are diversities in terms of language, race, caste, religion and tribe. Women constitute nearly half of India's population.

The status of women in India have many facets, and generalizations are, therefore, difficult. This is due to the existence of considerable variation between religions, linguistic, tribal and caste groups. It is a naked truth that despite these variations, differences and distinctions, women in India, share a common experience of marginalisation. This is equally true in the case of women in other countries of the world whether western or eastern, developed or underdeveloped.

Indian mythology refers to widely held beliefs about formal systems of society, rituals and woman-hood outlined in the scriptures. The women are treated as a symbol of motherhood in the Indian concept. In contemporary India, the position of women and their rights is complex due to various contradictory images of women. The ideal of a faithful, loyal, self-sacrificing and ever-forgiving mother is projected over the years. The reality of subordinate position of women is indicated through adverse sex ratio of girls, growing domestic violence and increasing atrocities against women. The latest census data on sex ratio is an eye opener to the Government, legal system, judiciary and voluntary and social organizations into the gravity of horrifying and inhuman, killing of female children in the womb itself

the female foeticide. Any attempt at empowerment of women or any number of legislation to secure the rights of women would be futile, if she is denied the right to take birth itself. With the elimination of women enmass, there is no relevance for women's rights. Therefore, it is most essential to have an in-depth, systematic and objective study on the background and causes of this phenomenon and to make meaningful suggestions to prevent this menace at the national perceptive.

The preparation of this thesis is an earnest and humble attempt towards that direction within the limitations of the available data, my knowledge and ability. I have tried to analyze the scope and magnitude of female human rights in the Indian context with special reference to female foeticide. I have also tried to trace the historical background of human rights development globally and in India in particular. In the preparation of this thesis I have referred to many authoritative textbooks, websites, consulted eminent academicians, social workers, study groups, and conducted a field survey. It is my duty to acknowledge and thank them all for the guidance and help given to me. To name each one of them would be a great task and hence I do not attempt so.

I am deeply indebted to Prof. (Dr.) J.D. Singh, Professor and Head of the Department, who has been the source of inspiration for me to undertake the doctoral research programme. His valuable guidance, supervision and constant persuasion have made the preparation of this thesis a reality. All words would fail to express my sense of gratitude to him. It is beyond words.

My thanks are also due to Prof. R. K. Srivastava, Head and Dean, Institute of Languages, Bundelkhand University; the members of faculty and staff of Institute of Law, Bundelkhand University; Jhansi,

Mrs. J. Sridevi, Asst. Librarian, Central Library, Bundelkhand University; the members of faculty of Indian Institute of Human Rights, New Delhi; Library staff of Indian Law Institute, New Delhi; staff members of Symbiosis College of Law, Pune; Asiatic Library members, Mumbai; staff of American Information Resource Centre, Mumbai; Advocates of Bombay High Court, students of Department of Human Rights, Stella Maris College, Madras, staff members of Central Law College, Salem, Tamil Nadu; and the library staff of Public Library, University Library and British Library, Trivandrum; who were all kind enough to help me by making available the various materials for reference. My special thanks is also due to Dr. (Mrs.) Naga Bhooshanam (Former Vice Chancellor, Tamil Nadu Ambedkar Law University, Madras) who gave the idea of research in my mind.

I also thank Dr. Vikraman Nair, Director, School of Legal Thought, Kottayam, Kerala; Prof. Radha G. Nair, Principal, Government Law College, Trichur, Kerala; and Prof. Rita Unnikrishnan, Principal, Government Law College, Calicut, Kerala; and Dr. Jayakumar, Head, Department of Law, University of Kerala for their valuable assistance.

I thank team of public-spirited youth who assisted me to conduct a field survey, the questionnaire of which is appended.

I owe a lot to my family for the successful completion of my research work. Primarily I owe to my deceased father who persuaded me to take up Law as my career despite my initial hesitations. My beloved mother has supported me throughout my studies. Though both my parents are not alive to witness the materialization of this thesis, I am sure they are showering their blessing from heaven upon me. I am thankful to my husband Mr. Anil G. Variath, who is a corporate Lawyer, not only for sharing my burden and assisting me in my work; but also for instigating me to pursue a research on this topic. I

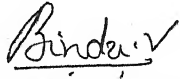
had to be separated from my husband and son due to occupational hazards and to complete this work. My sentiments towards my seven-year old son Aditya are immense. He has accommodated himself to the loss of parental care at this tender age without which it would have been impossible to do this work. My sincere gratitude is towards my father-in-law and mother-in-law for looking after my son with utmost love and affection, during the period I spent for this research work.

I will be failing in my responsibility if I do not thank Prof. Ramesh Chandra, the Honourable Vice Chancellor and Shri. V.K. Sinha, the Honourable Registrar, Bundelkhand University, Jhansi, for the sincere and efficient leadership given to the academic development of the University and its research programme and for the endeavour to make it an institution of excellence.

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DATE: 24-06-2004


BINDU VARIATH

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INTRODUCTION

India is the land of great values and virtues. It has a colourful past, a rich tradition and a glorious civilization. Political greatness or military power have never been its mission. But still it was a powerful race for ages. India has contributed immensely to all fields of human civilization; long ago and perhaps more than any nation ever did.

India has given to antiquity the earliest scientific physicians, and has even contributed to modern medical science by the discovery of various medicines and developing an indigenous system of surgery. Unmatched contribution were made in the fields of mathematics, geometry, astronomy, warfare etc., In music India gave to the world her system of notation; the 'Saptaswaras' and innumerable 'Ragas'. In philosophy our Sanskrit language is universally acknowledged to be the foundation of all European languages. In literature, our epics and poems and dramas rank as highest of any language. In dance she has a variety of forms which no other country has. In political science, India has a number of eloquent and elaborate philosophies about State Government, legal system and so on. She is the mother of "Sanathana Dharma" the religion of universal prosperity, peace and love. The social life and the concept of family in India cannot be matched by any other nation. As Swami Vivekananda rightly said 'I do not find in the whole world another country which has done quite so much for the improvement of the human mind'¹. Improvement of the human mind is the improvement of humanity, the development of principles of universal human culture and human rights. Thousands of years before the modern nations have subscribed to the universal declaration of human rights the scriptures and mythology of India had recognized all those principles laid down in the declaration,

rather with more ambit and emphasis. Though not termed as 'human rights' as we see in the modern sense; India had a larger vision about all the principles of modern human rights and has implemented in the governance of the country. The very concept of 'Vasudaiva Kadumbakam' is the manifestation of universal oneness. Is any example more than the prayer "Loka Samasthou Sukhinobhavanthu" and proclamation in Ishovasyopanisad "Isovasyamidam Sarvam", required to prove the commitment of India to the universal humanistic values. Therefore, it is quite essential and interesting to study the subject of human right of modern world in the Indian context.

Women in India occupied an uncomparable position of esteem. The ideal of womanhood in India is motherhood-that marvelous, unselfish, all-suffering, ever forgiving mother. In India the woman was the visible manifestation of Goddess. It is said in Sanskrit "yatra nary pujante tatra devo ramante" – Women have been given the ascription of Mother Goddess and is considered the source of shakti.² Again to quote Swami Vivekananda who proclaimed "O India! Forget not that the ideal of thy woman hood is Sita, Savitri, Damayanti"³. We have a long list of great women; both in scriptures and history to add here. Swamiji says "We should not think that we are men and women, but only that we are human beings, born to cherish and to help on another. He attributes neglect of women as one of the causes of India's downfall and says "Without Shakti (Power) here is no regeneration for the world. Why is it that our country is the weakest and the most backward of all countries? – Because Shakti is held in dishonour there"⁴.

¹ Complete works of Swami Vivekananda, Calcutta: Published by The Ram-Krishna Mission Institute of Culture, 1964, p.195

² Shah, Giriraj, *The Encyclopedia of Women's Study*, New Delhi: Gyan Publishing House, 1995, p.1

³ Swami Vivekananda, *My India – The India Eternal*, Calcutta: Pub: Ramakrishna Mission, 2000, p.62.

⁴ Ibid at 68.

The Swamiji further observed: "There is no chance for the welfare of India unless the condition of women is improved. It is not possible for a bird to fly only on one wing⁵.

It is true that women in India have been held in dishonour for long. There are many reasons for it. The emergence of concept of wealth and the inheritance of wealth in the patriarchal system., the political climate, the change in the outlook about family structure, the growth of castism, wrong interpretation of religious principles, the influence of western civilization, invasion by foreign powers, the wrong and superstitious belief about salvation only through the son, economic factors, consumerism are all responsible for the atrocities against women. The list of factors is not exhaustive. But the fact that at every moment the Indian women like their counter parts in any other part of the world is expose to the risk and danger of assault and oppression. Her thoughts, wealth, right and body are being alienated. Therefore a serious look into the rights available to a women in India in the light of global developments in the field of female human rights is essential.

The modern notions of human rights are however, originated in a western context and developed accordingly. Therefore a reference to the international context is also made in this work both on the development of human rights in general and female rights in particular. Enjoyment of human right by women will be meaningful only if the women are empowered. There has been a series of movements aimed at the emancipation of women globally; during the nineteenth and twentieth century. In India also similar movements have been successfully launched. The national movement of India

⁵ Deb. R. *Criminal Justice*, Allahabad: The Law Book Company Limited, 1998, p.274

and struggle for independence witnessed widespread women participation at all levels. But still we have to go a long way. To make the efforts at emancipating women fruitfully, there should be social, political, and legal reforms. All these areas have been touched in a gentle manner within the limitations of this researcher.

In Kumarasambhava, Kalidasa says: "The girl is the very life of the family"⁶.

If they are denied a chance to take birth and eliminated in the womb itself; what would be the situation? The horror of situation is unimaginable. But it is shocking to know that such a phenomenon is going on in our country over the years and the society has not so far taken serious note of it.

As a working lady and as person who have travelled the length and breath of India, I have come across with a number of instances, where atrocities are meted out to females. These experiences have instigated a thrust to do some creative work on any of these subjects. After coming to know about the phenomenon of female foeticide, it was decided that this subject shall be made the theme of my Doctoral research. When this idea was placed before my Professor and Head of the Department Dr. J.D. Singh; he readily endorsed the same and has consented to guide the research programme. One-day workshop conducted by Vatsalya in co-ordination with UNICEF has provided the required insight into the topic⁷. The Centre for child and the Law of National Law School of India University, Bangalore had undertaken a study on the legal aspects of female infanticide and female foeticide.

⁶ Grover. V and Arora. R, *Great Women in India – Indira Gandhi*, New Delhi: Deep and Deep Publications, 1999, p.131

⁷ Workshop held at Jhansi on 10.3.2002. (Female Foeticide and its various critical aspects)

The University was kind enough to share the information with this researcher. The data provided by various study groups and Non-Governmental Organization at micro level have been complied for this purpose. This researcher has also undertaken a field survey for the purpose of this research programme.

The most challenging task was, the non-availability of official and authenticated data, and books or material on the subject of female foeticide. Therefore, I had to depend heavily on secondary data and the fieldwork for the portion relating to female foeticide. For areas relating to human rights the primary source of books and material were at plenty. Within the limitations of the subject, the data, the knowledge and ability of the researcher all efforts are made to present the thesis in a simple, and lucid form and to incorporate the original ideas of the researcher. Based on the available material, research inferences, have been drawn and suggestions have been made which the researcher thinks would be beneficial to tackle the menace of female foeticide at least to some extent.

The entire work has been divided into five Chapters.

A study on any subject will not be meaningful without tracing its history. Human rights as a distinct discipline may be a recent origin. But the principles of human rights, the concept of certain inalienable rights and respect for human values were present in all civilizations from time immemorial. Therefore, the first chapter in this thesis is devoted for the historical developments of human rights globally with special reference to Indian context.

Females are considered as a vulnerable group by human rights activists and experts. Women's protection has been a burning topic in the development of human right principles all over the world. The problems faced by the female in general are similar around the globe.

India is a land of great human values where the virtues of women are held at high esteem and the women were protected, respected and worshiped. Women were treated as the symbol of motherhood and worshiped as the manifestation of Goddess. However, in reality the women in India are subjected to a number of humiliating and degrading treatments. The rights of the women with respect to the economic development, property, employment, movement and interaction, right to her self esteem, her body, sex, right to choose the sex of the offspring have been oppressed for long. The second chapter is an attempt to analyze the scope and ambit of various rights available to the females as a class in the Indian Context. This chapter is also a humble attempt to advocate the concept that all female rights are to be treated as human rights.

The rights discussed in the second chapter can be enjoyed by the females only if they take birth and exist in the society as females. The female sex ratio in India has been showing a declining trend for the last so many years as per the census data. The continuing declining ratio when compared to the international level of sex ratio and the fact that the females have a better biological strength than the males, indicate that there is a large-scale elimination of females by resorting to female infanticide and female foeticide. With the improvement in the medical technology and growth of infrastructural facilities, the female foeticide has become an effective means of eliminating the females on account of the easy method of implementation and the lesser extent of trauma attached to it. The female foeticide has become the substitute for female infanticide. This problem has different aspects, social, economic, cultural, medical, and legal. The impact of this phenomenon is horrifying on the society and all these aspects must be looked upon from the human rights and legal angle. The Chapter III and IV are devoted to make an earnest effort at this direction. Chapter III is an overview of

the problem as it exist on the basis of statistical data available and studies conducted at various levels by different organizations, institutions and the researcher herself. Chapter IV is a discussion on the medico-legal aspect of the problem and a review of the existing laws.

The problem of female foeticide is a social menace and a crime against humanity. The Government and interested organizations are making all out efforts to fight this social evil. But the desired result has not achieved so far. It requires a radical change in the mindset of the society, social and legal reform and awareness among the public. The Chapter V is the summary of inferences drawn out of the present research programme and some suggestions made by the researcher to eliminate this evil from the society.

The work would be a success; if it can contribute at least a little as a source of information in the fight against this horrifying evil. Finally I dedicate this work to the millions of unborn female children who have been the helpless victims of female foeticide.

CHAPTER - I

HUMAN RIGHTS - A HISTORICAL PERSPECTIVE

CHAPTER - I

HUMAN RIGHTS A HISTORICAL PERSPECTIVE

"These are the rights which no one can be deprived without a grave affront to justice. There are certain deeds which should never be done, certain freedoms which should never be invaded, something which are supremely sacred

'Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any map of the world. Yet they are the world of individual person; the neighbourhood he lives in; the school or college he attends; the factory, farm or office where he works; such are the places where every man, woman and child seek equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world'.

Eleanor Roosevelt. On the 10th Anniversary of Universal Declaration of Human Rights – U.N. March 27, 1958.

1.1 THE CONCEPT:

The value for individuals and their inalienable rights were in vogue in all civilized societies in one form or another right from time immemorial. It is rather, the basis of human civilization. The human character, being basically selfish; there had always been a struggle to establish one's own place in the pursuit of life in the society. There is a basic instinct in every human being to protect one's own natural rights and privileges. In the continuous struggle for such protection it is obvious that an

individual identifies and recognizes others around him who are ambitious of protecting their similar interest or rights and also align with them to put a concerted effort. The natural corollary is that the concerted action by a group will clash with the interests and rights of other groups who have also aligned together to protect their rights. The clash of these interest groups; which is in the form of mild resistance in the beginning would often grow up into class war and result in blood shed and loss of life. In the primitive societies the will of the mighty always prevailed over the others and the rights of the lesser mighty were not given any recognition. It was so in the initial stages of the civilized society also. But the losers were never prepared to give up for ever and the clash of interests were frequent in the society. The frequent clashes in the society and the increased struggle for everyone's due share in the social life have brought in a slow transformation in the mindset of the society itself. Each individual in the society was compelled to accept his own position in the society in relation to other individuals. Every individual had to draw a line of limitation to his liberty and to recognize the ambit of similar liberties of others. This has not only laid the foundation of organized social order and lead to the origin of state but also for the concept of collective rights and the individual rights within such collective rights.

With the emergence of state as a political institution the responsibility of maintaining law and order was vested with it. The people who are its subject looked upon to it for the protection and enforcement of their rights. Interestingly the state itself has started curbing the rights of the subjects in its quest to establish its own authority over the subjects. Restricting the individual liberty in the state by striking a harmonious balance between the individual rights, interest of the society and the authority of the state, is therefore; the greatest art of good governance. However; a glance at the history, would present innumerable instances of

the state crushing the individual freedoms and rights for narrow political gains.

The consequence of such instances were the collective action on the part of the people to defend and protect their individual liberties and ultimately the state had to recognize the rights and liberties and to impose certain self restrictions upon its ambit of authority. These innumerable uprisings are the early movements in the development of human rights. A large number of such isolated uprisings faded into history unnoticed and unrecorded. But they have culminated in the development of the law of human rights to ensure that individuals are protected from the excess of states and governments ¹. The concept of Human Rights according to M.P. Jain can be traced to the natural Law Philosophers. It is an attempt to protect the individual from oppression and injustice. It has therefore come to be regarded as essential that they may not be violated, tapered or interfered with by an oppressive government².

The concept of Human Rights encompasses everything that is essential for qualifying as a true human being³.

The earliest milestones in the history of the modern human rights can be traced back to the Magna Carta (1215 AD). The petition of Rights (1627) the Bill of Rights (1688) in UK, the Declaration of the Rights of Man (1789) by French National Assembly, which all have influenced the framing of the U.S. Constitution⁴.

¹ Dixon Martin; *Text Book on International Law*, Delhi : Universal Publishing Co. Ltd., 2001, p.327

² Jain M.P. *Indian Constitutional Law*, Nagpur : Wadhwa and Co., 2001, p. 457.

³ Jhunjhunwala Bharat, *Governance and Human Rights*, Delhi : Kalpaz Publications, 2002, p. 165.

⁴ Shah and Gupta, *Human Rights: Free and Equal*, Delhi : Anmol Publications, 2001, p.127.

The first milestone in the history of efforts towards the protection of individual rights against the arbitrary action of state is the “MAGNA CARTA” ; granted by King John of England to the English barons on June 15, 1215. The English barons were protesting against the heavy taxes imposed by the crown. The protesters were unwilling to accept the taxes as they were imposed arbitrarily. They declared “no taxes without representation”. The protest soon gathered momentum and governance became difficult. The King was finally forced to grant some concessions to the barons and the concessions so granted by the King under a Royal proclamation containing seventy clauses are called “Magna Carta”. It was confirmed by the British Parliament in 1217 and was modified in 1297 during the reign of Edward-I.

The essence of “Magna Carta” was the protection against arbitrary acts by the King. This is the first written document relating to the fundamental right of citizens⁵. It provided that land and property could no longer be seized, judges had to know and respect laws, taxes could not be imposed without common council, there could be no imprisonment without trial, merchants were granted right to travel freely within England and outside, and also provided protection against arbitrary arrest and imprisonment.

The ‘Human Rights’ as a distinct discipline as we see today is the result of development in the field of International Law; especially after the World War-II. The classical International Law was solely concerned with the states and theory of State Sovereignty was given paramount place. The human beings as individuals belonged to one state or another through the bond of citizenship or nationality and stood in relation to other states as ‘aliens’. The state to which the individual belonged was alone responsible to protect the individual in case any injury was caused to him. Even in cases where the injury was caused by the state itself,

⁵ Pandey J.N. *Constitutional Law of India*, Allahabad, Central Law Agency, 2005, p. 48

the other states had no role to play. Thus, no place was left for the individuals in the field of International Law and the states alone were its subjects. Even in those cases where individuals enjoyed certain rights and duties in conformity with, or according to International Law such as the rights enjoyed by Heads of State while on foreign territory, diplomatic envoys etc. The Rights in question were enjoyed by the individuals concerned not as rights in International Law but as rights derived from national law⁶.

The transformation of the position of the individuals after the Second World War has been one of the most remarkable developments in Contemporary International Law. In addition to the states, individuals are also regarded as the real subjects and beneficiaries of International Law by virtue of having rights and duties flowing directly from International Law. While a few rules are directly concerned with regulating the position and activities of individuals, a few others indirectly affect them⁷.

However as long as the International community is composed of States, it is only through the exercise of their will alone rights and duties are conferred to them. They may agree to confer particular rights on individuals, which will be enforceable under International Law, independently of municipal law. Human rights is one of such rights which has been conferred to individuals by the States in the modern International Law.

Human beings possess certain basic and inalienable rights by virtue of their very existence as human beings. These rights are collectively known as human rights. These rights being the basic rights, they become operative with their birth and continue for ever; even after their

⁶ Oppen heim, *International Law*, Oxford : Oxford Publications, Ninth Edition, 1992 p. 847.

⁷ Ibid: p. 846

death. Human rights, being the birth rights are, therefore, inherent in all the individuals irrespective of caste, creed, religion, sex and nationality. These rights are essential for all the individuals as they are consonant with their freedom and dignity and are conducive to physical, moral, social and spiritual welfare⁸.

'Human Rights' means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International covenants and enforceable by courts⁹.

The noted Jurist Durga Das Basu, defines human rights as those minimum rights which every individual must have against the state or other public authority by virtue of his being a member of human family; irrespective of any other consideration¹⁰.

According to Bennet " Human Rights include those areas of individual or group freedom that are immune from governmental interference or that, because of their basic contribution to human dignity or welfare, are subject to governmental guarantee, protection or promotion¹¹.

According to Maurice Cryston it is very difficult to define the expression 'human rights' mainly because of differences in cultural background, legal systems, ideology and economic social and political conditions of different states. However, it can be said that the rights that all people have by virtue of humanity are human rights¹².

⁸ Agarwal H.O, *Human Rights*, Allahabad : Central Law Publications, 2001,p.1-2.

⁹ Chandru K, *Child and Welfare in India*, Tamil Nadu, Indian Council for Child Welfare Pub, 1988, p. 554

¹⁰ Basu D.D, *Human Rights in Constitutional Law*, 1994, p.5.

¹¹ Bennet, *International Organisations*, Cambridge : Blackwell Pub., 1996, p.258.

¹² Cranston. Maurice; quoted in Macfarlane, L.J., "The theory and Practice of Human Rights, 1985, p. 7.

Dr. S. K. Kapoor says that Human rights are the rights which are possessed by every human being, irrespective of his or her nationality, race, religion, sex, etc. simply because he or she is a human being¹³.

The various interpretations given by jurists, courts, tribunals & academics across the world would show that there is a widespread acceptance of the importance of human rights at the international level. Two factors have contributed to this acceptance viz., first the increase in the control over individual action by the governments and second; the consciousness on the part of the human beings as to their rights.

As already seen, enforcement and protection of human rights call for positive intervention and active participation on part of the state, the precise nature and scope of these rights and the degree of their recognition and enforcement varies from nation to nation. However, beneath these differences, certain common universal features of similarity can be observed. It would be interesting to have a quick look at the nature of these rights and sources from where they derive authority in the light of underlying universal similarities.

1.2 Nature and Sources of Human Rights:

The expression 'Human Rights' has not been specifically defined in any Declaration or Covenant of the United Nations. Human rights are "those rights which are inherent in our nature and without which we can not live as human beings". The recognition of these natural rights of human being is as ancient as the human civilization¹⁴.

¹³ Kapoor S.K., *Human Rights under International Law and Indian Law*, Allahabad : Central Law Agency, 2001, p. 1.

¹⁴ Shah, Giriraj and Gupta K.N., *Human Rights Free and Equal*, Delhi, Anmol Publications, 2001, p. 127.

Human Rights are indivisible and interdependent, and hence it is not possible or advisable to categorise them into separate watertight compartments. However, for academic purpose; based on the nature of rights, they can be broadly classified into:

(A) Civil and Political Rights

(B) Economic, Social and Cultural Rights

The rights, which are concerned with the protection of life and personal liberty, are generally called as civil rights.

Political rights are such rights, by its nature; are essential for a person to participate in matters of governance of his state and to facilitate the expression of his political determination.

While the civil rights confers certain inalienable positive rights on individuals, the political rights imposes certain negative restrictions upon the state and the state is required to abstain from doing such activities which would violate the political rights of the individuals. Thus the civil and political rights are so inseparably intermingled as light and shade.

On the other hand, the Economic, Social and Cultural rights refer to such rights, which are essential for the individual for his existence as a human being and for the pursuit of a happy and dignified life with peace. These rights include the right to adequate food, clothing, shelter, drinking water and adequate standard of living, right to work, social security, education, physical and mental health, wholesome environment, right against exploitation and so on. These rights can be secured only through the active intervention of the state and the state has to play a positive role. Most of the modern states have now made

necessary provisions in their constitution itself to secure these rights to their subjects¹⁵.

The International Human Rights Law as we see today derives authority from various sources such as:

1. International Customs
2. International Treaties
3. International Declarations
4. International Documents
5. Judicial Decisions

1.3 Evolution of Human Rights Philosophy and Laws:

It is highly important to have an insight into the evolution of human right philosophy, before; approaching the subject as it is. All major religions in the world have a humanist perspective that supports human rights despite the differences in the contents. No doubt that these religious thinking have contributed a lot to the development of ideals like 'virtue', 'justice', 'fairness', 'morals' etc and led to the philosophical concepts of "natural law" and 'natural rights'. The idea of human rights is also rooted in the ancient concepts of **"natural law and rights"**. Early sparks of human right ideals can be traced from the Laws Promulgated in ancient days during the reigns of Urukagina of Lagash (3260 B.C) Sargon of Akkad (2300 B.C) Hammurabi of Babylon (1750 B.C.) Laws of Hittiti and in the concept of 'Dharma' of the vedic period in India¹⁶.

The concept underlying human rights, perse, is not new, although the name is. These rights were recognized way back in history in some of the Greek States who were familiar with modern concept of freedom of speech (Insogonia), equality before the law (Insonomia) and equal respect

¹⁵ Agarwal H.O., Op. Cited p.7

¹⁶ Devine, Carol, *Human Rights*, Arizona: The Oxford Press, 2000, p. 19.

of all (Isotimia). Many countries have since recognized the basic human rights¹⁷.

A systematic study on the evolution and development of the philosophy and concept of human rights and the historical development of human rights laws begins with the philosophers and rulers of ancient Greece and concludes with the aftermath of World War-II which culminated into the Universal declaration of Human Rights in 1948. In this study a humble attempt is made to have a quick look at pivotal eras and developments in the subject from a historical angle and to present a few snapshots in the foregoing paragraphs.

1.4 The Greek Philosophy:

“.... The real difference between democracy and oligarchy is poverty and wealth Oligarchy is when the control of the government is in the hands of those that own the properties, democracy is when, on the contrary, it is in the hands of those that do not possess much property, but are poor.....”¹⁸

Aristotle

According to Mamta Rao, the genesis of human rights is the utopian concept of natural rights traceable from the days of the Greeks or even earlier¹⁹.

At first “ the Greeks” were a mere collection of city-states with diverse governments, military styles, and social mores. Later, they included cities on the Peloponnesus (the southernmost landmass of present-day mainland Greece) and hundreds of overseas colonies along the

¹⁷ Agarwal, Nomita, *Jurisprudence*, Allahabad, Central Law Publications, 2001, p. 324.

¹⁸ Aristotle: Politics – Cited by Devine and Others in “*Human Rights*, Arizona, USA: The Orxy Press, USA, 1999, p. 123 (AIRC Mumbai)

¹⁹ Rao, Mamta, *Public Interest Litigation*, Lucknow: Eastern Book Company, 2002, p.5.

Mediterranean. Greeks shared a common language, religion, and literature, along with comparable political societies.

Greek religion and political culture provided the antecedents of claims to universal law that are underlined in our modern conception of human rights. Early Greek cosmologies viewed humanity as existing within the transcendent harmony of the universe, stemming from the divine law (*logos*) and linked to human life in the law (*nomos*) of the *polis*, the city-state.

The Sophists²⁰ pointed to major differences in morals and human law (which began in Greece as a public arbitration to settle compensation due to injuries) and rejected the claim that human law necessarily reflected any universal law. Taking humanity as “the measure of all thing,” they saw law, justice, and morality as stemming from human reason alone.

However, a modern concept of rights was introduced by King Solomon (638-559 B.C.), whose name survives as a synonym for “legislator.” Solomon codified the laws and is credited with erecting the basis for the first democracy in the city-state of Athens. By 458-457 B.C. all citizens but the lowest property class could vote, and even the highest office was open to more than half the citizens²¹.

In fifth-century Athens, **Plato (427-348 B.C.)** looked beyond the law of the city-state in search of a more permanent and unimpeachable source of justice. In his *Republics* (400 B.C.) Utopia, Plato argued that justice prevails when the state reaches ideal forms ordained by its philosopher-kings and is unrelated to the *nomos* of the *polis*. His concept of the common good contains an unusual defense of equal rights for women

²⁰ Sophists were members of a pre-Socratic school of philosophy in ancient Greece. Ibid at p. 133.

²¹ Ibid, p. 136.

and a universal moral standard for human conduct, in war or peace, equally applied to Greeks and foreigners²².

Aristotle (384-322 B.C.) considered humanity to be moral, rational, and social, and he judged his law by how well it promoted these innate qualities. His *Politics* evaluated values such as virtue, justice, and rights and showed that they are best preserved in a mixed government (not a pure democracy, oligarchy, or tyranny) with an economically strong body of citizens.

Soon after Plato and Aristotle, a new philosophical ideal, **stoicism**²³, came to the fore. Unlike Plato and Aristotle, who emphasized the individual and his innate capabilities, Stoicism held that people must be free from passion and calmly accept all occurrences, as the unavoidable result of divine will. Stoics believed in the existence of a natural law, the *jus naturale*, born of the *lex aeterna*, the cosmos' law of reason. Man's reason tied him to the cosmic order and put all under a universally valid moral law.

While Greek philosophers lent weight and grace to the oratory of the Greek *polis*, they never guaranteed humane conduct by the state. They did greatly enlarge the sphere of politics; indeed, the word philosophy originally meant something like "devotion to uncommon knowledge" and did not enjoy widespread recognition until the time of Plato. The most important contribution of Greek Philosophy is the in-depth study of law, the state, and moral conduct, as well as their belief that both common people and their leaders must bear responsibility for ensuring justice and the common good under a universally valid moral law²⁴.

²² www.wn.com/humanrights.

²³ Founded by Zeno of Citium in Cyprus (335-263 B.C.) – Carol Devine; Op. cited : p.136.

²⁴ Bobbio, Norberto: *The Age of Rights*, Cambridge : Blackwell Publications, 1906, p.200.

1.5 Impact of Roman Law:

Augustus Ceasar was the first emperor of Rome. He restored order to the republic and gave justices a new professional and authoritative role. Roman Law was greatly influenced by the Greek philosophy. With regard to the impact of human rights, Rome owes a lot to the Greek. The influence of Greek philosophy on the Roman law not only developed the concept of natural law, but also introduced a belief in universal rights for all. Rome on the other hand added its own contributions in law and politics to the base of Greek philosophy. These included professional justice, use of precedents in judicial decisions, written codes of law, standards for assessing the legitimacy of law and tradition. Romans also revolutionized the concept of citizenship, introduced a belief in equal rights for women, and elevated freed slaves to high positions of authority²⁵.

The history of Roman Empire is marked with constant conflict between the individual and the state in the form of struggle for political power between the patricians (wealthy aristocrats) and plebeians (everyone else except slaves, including small land lords and peasants). Though the election to government posts was open to all freeborn adult male citizens, the system was weighted so that the rich held the most influence. The conflict for power ultimately led to the publication of Twelve Tables, the ancient Roman law²⁶.

Under the Roman Law, the citizens would not only vote, but they could appeal a criminal charge to the assembly and later to the emperor. Compared to the ancient Greek the citizenship in Roman was very liberal and offered a lot of protection to the citizens. However it was more weighted towards duties than to rights.

²⁵ Redman and Whelen, *Human Rights – A Reference Handbook*, England : ABC-CLIO Publishers, 2000, p.120.

²⁶ Ibid at p. 122.

The Roman concept of natural law clearly legitimized slavery, antithetical to human rights today; given our concern with freedom, equality, and liberty. Slavery was essential to the economy and a handy manner of dealing with some conquered peoples, as well as a deterrent to rebellion from others. However, the progressive aspect having bearing on human right was that the slaves had a right to acquire freedom and after attaining freedom they had the right to rise to public office also²⁷.

The current belief in equal rights for women is also rooted in the Roman period, during which their status improved. Free women in Rome lived better than in classical Greece. They enjoyed the rights to own private property, travel unaccompanied, engage in commerce, or interact on a fairly equal basis with men²⁸. Roman women suffered restrictions however. The Roman father (*paterfamilias*) held impressive power, including the right to custody of children after a divorce.

The legal status of children was carefully defined. All children had equal rights of inheritance. Children of six and under were not legally responsible for their actions. It was customary for the father to recognize his child; if he did not, it could be exposed. In poor families, unwanted children, especially sick babies or girls, were exposed, and the *paterfamilias* could sell his own children into slavery or kill them, though this was rarely done²⁹.

The legacy of the Roman Empire was rooted in its administrative and legal accomplishments. Their genius lay in how they treated people, not their own citizens, but conquered peoples whom they embraced. Their law set impartial standards, adhered to precedent, was known to the people, and constrained even the emperor.

²⁷ Paul, *International Human Rights in Nutshell*, New York : West Publishers, 1995, p. 29.

²⁸ *Ibid* at p.31.

²⁹ *Ibid* at p. 33.

With the teachings of Jesus Christ a new faith and a new way of life in the empire were born. Slowly many of the virtues of the Christian culture began to influence Roman culture, political system and the legal system.

1.6 Judeo – Christian Contribution to Human Rights:³⁰

“ If I am for myself alone, then what am I? And if not now, when?”

- Hillel (Jewish Sage).

“He who destroys one soul is considered as if he had destroyed a world, and he who saves one soul as if he had saved a world”

- Talmud (Sanhedrin 37)

“Blessed are those who hunger and thirst for righteousness, for they shall be satisfied Blessed are the peacemakers, for they shall be called the sons of God.”

- Mathew 5:6-9

The contributions of the Judeo-Christian tradition to our modern conception of human rights are rooted in the fundamental principle of Judaism-and subsequently Christianity-that humankind was created in God's image, and therefore every person has a divine link to the Creator. A traditional Jewish aphorism illustrates this tie: “Whenever you come across a footprint of man, God stands before you.”

For thousands of years Judaic theologians have advised that, since every person is fashioned in God's image, the best way to love God is to love thy neighbour (Lev. 19:18). With that love, however, comes responsibility:

³⁰ Carol & Others; *Human Rights – The Essential Reference*, Arizona, USA : The Oxford Press, 1999, p.p.17-20.

as Job say in the Old Testament, "If I have rejected the cause of my manservant or my maid-servant when they brought a complaint against me, what then shall I do when God rises up? Did not he who made me in the womb make him³¹. Each person is deserving of respect and dignity because each person is, at least in a small way, godlike. This reasoning along provides a complete defense for human rights. Torture, executions, and other human rights abuses, for example, are an affront to humankind because they are an affront to God. Judaism puts great emphasis on the importance of working toward a more just world.

Jesus Christ instructed, "Give to him who begs from you, and to not refuse him who would borrow from you".³² Christ's life story is one of willing sacrifice on behalf of fallen world. His teachings on behalf of the weak, lame, sick, widowed, orphaned, poor and the disenfranchised continue to serve as a model for many contemporary human rights activists.³³

Judeo-Christian philosophy proclaims that the authority of God is higher than any secular one. This long-held belief in God's sovereignty over the state is so fundamental in both Jewish and Christian faiths that many religious martyrs throughout the centuries have given their lives in pursuit of human rights goals.

The Judeo-Christian tradition has shaped the modern conception of human rights. Indeed, its philosophical contributions are manifold: the indivisible link between humans and their Creator, the all-embracing brotherhood of mankind, the responsibility of each individual to work toward a more just world, and the supremacy of spiritual authority over secular power.³⁴

³¹ Old Testament : Job : 31.13-15.

³² The Holy Bible : Mathew 38-42.

³³ Devine and Others : Op. cited p.19.

³⁴ Ibid : P.23.

1.7 English Concept of Laws and Rights:

Following the fall of the Roman Empire, Judeo-Christian traditions gradually influenced many institutions throughout Europe-including the monarchy and ruling class in England. By the end of the feudal era, the English were the first to restrict the rights of the absolute monarch, long before continental Europe seriously challenged the “divine right of kings”. The Magna Carta is the first milestone in this direction.³⁵

King John brought the Magna Carta or “Great Charter of Liberties” and committed himself as well as his “heirs, for ever” to grant “to all freemen of the kingdom” the rights and liberties enumerated in the Magna Carta.

As the first major step in delimiting the power of British monarchy, the Magna Carta led to many constitutional developments. Important to the history of human rights was the Petition of Right (1628) during the reign of King Charles I.

It laid down four principles: no “loans” without the consent of Parliament; no “gentlemen” who refused such loans would be arrested, and no imprisonment was to occur without just cause; no soldiers were to be housed on the citizenry in order to save the crown money; and no martial law could be imposed in peacetime.

Angered by the content of the same the King dismissed Parliament for eleven years and tried to raise money in unorthodox ways. The result was the English Civil War of the 1640s, which Parliament eventually won. (Charles was executed for treason in 1649.) Nevertheless, stiff

³⁵ Supra at p.25.

precedent had been set, and Parliament insisted that subsequent monarchs adhere to these key restrictions on the monarch's power.³⁶

The Parliament's conflict with the throne has helped to shape the development of civil, political and human rights. When riots forced King James II to flee into exile, Parliament invited William III and Mary II (daughter of James II), prince and princess of Orange, to be crowned. After their coronation, Parliament passed "an act declaring the rights and liberties of the subject and settling the succession of the crown" on December 16, 1689. This enactment is called English Bill of Rights. Through this Bloodless Revolution, or The Glorious Revolution, the English formally ended the "divine right of kings."³⁷

English history of the development of modern human rights was that the Magna Carta initiated the first effort to check the absolute power of the monarch and encouraged subsequent monarchs to work with their barons, who ultimately evolved into a parliamentary body. This effort was finally successful some four hundred years later with the English Bill of Rights and the Glorious Revolution, when the absolute power of the monarch in England was broken.

Prominent seventeenth-century philosophers who helped define the ideological battle-ground between the English Parliament and its monarch through 1689 included **John Locke** (1632-1704) and **Thomas Hobbes** (1588-1679). **Jean-Jacques Rousseau** (1712-78). Together, these three had the most profound impact on European notions of a person's natural rights and the social contract that he or she entered into with the state. These social contract philosophers challenged kings

³⁶ www.hrweb.org/htt.history

³⁷ Lawson, Edward; *Encyclopedia of Human Rights*, Washington : Tarylor & Francis Publication, 1996, p.87

who failed to meet their natural law obligations to protect their subject, and the shift from natural law as “duty” to natural law as “right” began.³⁸

1.8 The American Revolution:³⁹

English constitutional development and natural rights theory were the intellectual antecedents for the United States’ war of independence and its subsequent constitutional developments.

America’s open rebellion was an economic protest overlying an ideological one. The immediate cause of dissatisfaction was unfair taxation. In an attempt to increase crown revenues and force the colonies to pay for more of their own defense, Parliament passed a Declaratory Act in 1766 allowing England to tax the colonies as it wished, and in 1767 Parliament imposed duties on imports of English tea, pepper, and other products. Despite American protests and calls for liberty England reformers did not change the policy. On December 16, 1773, Americans dumped the tea shipped to America under Tea Act into Boston harbour. Parliament responded by blockading Boston’s port until Massachusetts repaid the merchants and government for the lost tea. The tension resulted in Open fighting in April 1775.

By October 19, 1781, Lord Cornwallis, commander of the British forces, was forced to surrender and America declared independence. The American Declaration of Independence was the first civic document that met a modern definition of human rights. It states

“ We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with unalienable

³⁸ Radman and Whalen, *Human Rights, A Reference hand book*, England : ABC-CLIO Publications, 1992, p.115

³⁹ Devine and Others; *Human Rights : The Essential Reference*, Op. Cit : p.p.35-42.

Rights, that among these are Life, Liberty, and the Pursuit of Happiness.”

- U.S. Declaration of Independence⁴⁰

It asserted universal rights that applied to the general population, included legal as well as moral obligations, and established standards for judging the legitimacy of the state's actions. It was truly modern in arguing that Americans possessed “inalienable rights” and that government authority derived from the consent of those it governed. The Declaration also asserted that the people could limit state power if their human rights were abridged: if governments violated the “unalienable rights” to “life, liberty, and pursuit of happiness,” then the people could rebel.

1.9 The French Revolution:

“Liberate, Egalite, Fraternite!” (“Liberty, Equality, Brotherhood!”)

- watchwords of the French Revolution⁴¹

The French Declaration of the Rights of Man and of the Citizen in 1789 was the second major achievement in politically promoting natural rights. Buoyed by America's successful independence struggle, the French Declaration boldly stated that “men are born and remain free and equal in rights,” while arguing that the “aim of every political association is the preservation of the natural and imprescriptible rights of man.” It described those rights as “Liberty, Property, Safety, and Resistance to Oppression” and assured.

“Whatever is not forbidden by law may not be prevented, and no one may be constrained to do what it does not prescribe.” It also offered human

⁴⁰ www.stu.edu/humanrights.

⁴¹ www.stu.edu/humanrights

rights guarantees: protection from arbitrary accusation, arrest, detention, and punishment; the presumption that every person is innocent until declared guilty; freedom of thought, speech, and religion; assurances that taxation would be equitable, based on means to pay, and that the citizenry could "supervise its use, and determine its quota, assessment, payment and duration;" and finally, since property was "a sacred and inviolable right." no one was to be deprived of it unless by legally established necessity and means.⁴²

1.10 The Socialistic View:

The Britain led the world during the first phase of industrial revolution, until 1870. It brought in a complete transformation of English industry and society. The industrialization was influenced by the liberal ideas of Adam Smith and others and the theory of non-interference by the state. This has brought in unhealthy competition and large-scale exploitation of the workers by the capitalists. Millions of workers toiled under inadequate wages and with poor health. The workers in England, Germany, France started reacting to the horror by organizing themselves. This has resulted in progressive Labour reforms in many European Countries.

The Socialistic ideas which opposed the liberal emphasis on laissez-faires has influenced the labour movement. The leading thinkers who shaped the Socialists' human rights agenda were **George Friedrich Hegal** (1770-1831); **Karl Marx** (1818-1883); **Friedrich Engels** (1820-1895). They approached the problem of production, distribution of wealth, economic power and human rights through the economic point of view and advocated the class theory of 'haves' and 'have nots' Marx and Engels together attached liberal interpretations of human rights. The French thinkers **Pierre-Joseph Proudhon** (1809-1865) argued against property

⁴² Lawson, Edward, *Encyclopedia of Human Rights*, Op. Cit : p.123

rights. **Marx, Engles, Proudhan and August Babel** (1840-1913) advocated equal status for women and equal pay for equal work.⁴³

1.11 League of Nations:

"The War to End all Wars....."

- Woodrow Wilson ; U.S. President

As Western powers gradually became sovereign over much of the world through colonialism and trade, the ideological and political conflicts which had been confined to Europe advanced to the International stage by the early twentieth century.

The World War-I was a turning point at in the development of human right development as it convinced many leaders that a more principled international arena and codes of conduct were needed and increasing recognition was received to the claims of political self-determination.

The then U.S. President Woodrow Wilson has played a vital role in the peace process after the War. He was a strong Advocate of universal self-determination; and was one of the founding fathers of the League of Nations. In his famous address to U.S. Congress in 1918, he presented the famous "fourteen points: which has significance in the history of human rights. He stated that it is the principle of justice that all people shall have a right to live on equal terms of liberty and safety with another, whether they be strong or weak". He hoped to institutionalize these rights in a League of Nations, which would be empowered to settle nationalistic conflicts.⁴⁴

⁴³ Metuchen N.J, *Human Rights in Theory and Practice – A Selected and Annotated bibliography*, New York, Scarecrow Press, 1995, p.212.

⁴⁴ U.N. Reference Guide in the field of Human Rights : U.N. Publications, New York.

It would be interesting to pass a glance at the economic and political situation of Europe after World War-I. In the political front four empires viz., the Czars in Russia, the Ottoman Empire, Kaiser Wilhelm II's German Empire and the Austro-Hungarian Empire collapsed as an aftermath of the war. Three new state viz. Czechoslovakia, Yugoslavia and Poland were created. In the economic front the situation was horrifying.

Some six thousand people were killed each day for four years (eight and a half million.) *Sixty-five million men were soldiers, and of these about thirty-seven million were casualties, including perhaps seven million who were permanently disabled. About another 12.6 million died of war-related causes. Austria-Hungary suffered a 90 percent casualty rate, and Russia 76 percent, while the United States (entering the war late) only had an 8 percent rate.*⁴⁵ With so many dead, Europe became a continent of widows and spinsters. National budgets were exhausted helping the survivors. Birthrates fell precipitously, national economies operated at a fraction of capacity, agriculture stagnated, and starvation and poverty loomed each winter.

In the face of all these, the Covenant of the League of Nations (1919) was designed to enhance security, peace, individual and group rights, and interstate cooperation. It proposed security guarantees as well as efforts to monitor and control disease (the worldwide outbreak of influenza that killed some twenty-seven million people was a horrible precedent), prohibit the exploitation of children and women, improve working conditions, and appropriately treat, educate, and eventually prepare colonial people for self-government through the mandates. The Covenant also showed concern for human rights in its mandate system for territories previously controlled by Germany, through Article 23 on labour conditions, and in the discussion of "the traffic in women and

⁴⁵ James L. Stokesbury, *A Short History of World War I*, New York : Quill Publishers, 1981, p. 111.

children.” The League of Nations was dissolved in 1946 and replaced by the United Nations.

1.12 U.N.O and Universal Declaration of Human Rights:⁴⁶

The International community has conceived the idea of human rights and fundamental freedoms long before the formal adoption of Universal Declaration of Human Rights in 1948. However the declaration is the first attempt to institutionalize the concept of human rights at the International level. The covenant of the League of Nations, adopted at the end of the First World War is the pilot covenant to the declaration of Human Rights. The covenant of League of Nations pledged for the protection of minority rights and respect for the human rights, it was silent on the issue of protection of human rights, and the issue continued to be dependent upon the provisions of the respective national Laws.

One of the major issues the founding fathers of the United Nations had to address at the San Francisco Conference in 1945 where they met to draft the Charter of the United Nations, was the demand from various states to incorporate an International Bill of Human Rights in the Charter. But a specific list of rights could not be prepared due to lack of time. However, the members realized that it should be an obligation of the international community to promote and protect human rights. As a result a number of provisions of general nature for the promotion and protection of human rights were incorporated in the Charter of United Nations itself.

After the U.N. Charter came into force, the most important task before the United Nations was the implementation of the principles of the

⁴⁶ Morsink & Johannes, *UDHR – Origin, Drafting and Intent*, New York : Oxford University Press, 1993, p.p.57-73.

respect for human rights and fundamental freedoms. It was therefore decided to prepare an International Bill of Rights to achieve this end and the task was entrusted a Committee known as Drafting Committee by the U.N. Commission of Human Rights. The documents prepared by the drafting committee was considered by the commission as Human Rights and the working groups appointed by it and finally assumed the shape of Universal Declaration of Human Rights and International Covenant of Human Rights.

The Universal declaration was adopted by the U.N.O in 1948 and the two international covenants in 1966. The Universal declaration represents a milestone in the history of human rights, a veritable Magna Carta marking mankind's arrival at a vitally important phase: the conscience acquisition of human dignity and worth. As Kelsen⁴⁷ pointed out it is a recommendation to every individual and every organ of the society to do something with respect to the human rights laid down in the declaration. Considering the importance of the declaration as the basis of all modern human rights laws the text of the declaration is appended.

1.13 The Hindu Concept:

Though the human rights concept is of a recent and Western origin, the principles of human rights were seen embodied in the ancient Hindu legal system. In that system law was part of 'Dharma' which meant rightful conduct and doing one's act with noble intentions. The 'Sanatana Dharma' as it was called laid stress on nobility of action. Every Human conduct was directed to the ultimate end of preservation of human society and human values. The ancient concept of Hindu law took within its sweep various fields such as moral, social, legal and religion. According to 'Manusmruti' conduct is the basis of Dharma. It is not what you say but what do which constitute Dharma. It proclaims

⁴⁷ Kelson, "*The Law of United Nations*" Cited by Devine and Other, Op. Cit. p. 43.

'Achara paramou Dharma'. Manu emphasized that Dharma consist of 'Sadachara' which means noble deeds. Thus there was complete blending of religion, morality and law in the ancient concept of Dharma; which corresponds to modern conception of law. It is thus evident that Hindu perception of law is broad based, liberal, flexible humane and just.⁴⁸

According to the ancient legal thought it was the duty of the King (Rajadharma) to enforce law and punish the guilty. There was complete code of punishment and conviction by name '**danda neeti**'. Every act of punishment was to be fair, reasonable and just. Manu says danda keeps the people under control without which there would reign anarchy; wherein people would devour each other just as fishes do in water, the stronger eating up the weaker. So he remarks danda remain awake when people are asleep.

The Arthashastra of Kautilya written during the Maurya Rule was a masterly treatise on Indian polity, and King's duty and his administration of justice, courts, legal procedure, taxation, rights of women, law of marriage, divorce, succession etc. Thus it covers all aspects of law.⁴⁹ The Hindu laws emphasised respect to human values and also recognized the place of every creature in the world, including animals, plants and the tiny creatures and prays 'Loka Samastau Sukhno Bhavanthu'. Thus it can be seen that the ancient Hindu concept of law embodied in itself all the principles of human rights more vigorously and widely. It is unfortunate that with the passage of time the values cherished in the vedic period and the ambit of the ancient Hindu concepts on justice, equality, liberty and individual freedoms and rights have slowly declined due to various reasons and with the advent of

⁴⁸ Manusmriti, D.C. Books, Kottayam, 1995, p. 87

⁴⁹ Ashirvadam, *Indian Political Thought*, Hyderabad : Charminar Press, 1990, p. 81.

foreign rule a new set of laws and legal standards were transplanted to India.

1.14 The Islamic View:⁵⁰

As a religion Islam is the most misunderstood one. The main reason for it is the wrong interpretation of the dictates of Quran by the Islamic experts themselves. The rulers of Islamic countries throughout the world have been rigid and their administration lack transparency. They have used the religion to safeguard and protect their powers and misdeeds. However, it is interesting to note what the Quran and Islamic dictates actually says about human values.

Quran emphasis the righteousness. It exhibits particular solicitude towards women as well as other classes of disadvantaged persons. It emphasis the duty of society to protect the disabled, and destitutes. It also cast a duty upon all subjects do donate a days wages/income every month for charity. In case of women it provides particular safeguards for protecting women's sexual/biological functions such as carrying, delivering, suckling and rearing offspring.

The goal of Quran is to establish peace, which can only exist within a just environment. It regards home as microcosm of its believers and believes that human beings can learn to order their homes justly, so that rights of all within it, the men-women-children- are safeguarded, then they can also justly order their society and the world at large.

According to Islam, God, who speaks through the Holy Quran, is characterized by justice, and it is stated clearly in the Quran that God can never be guilty of 'Ulm' (tyranny, oppression or wrongdoing). Hence, the Quran as God's word, cannot be made the source of human injustice,

⁵⁰ Riffat Hassan, *An Islamic Feminist Perspective*; Muslim World, 2001, Vol. 91.

and the injustice to which the people subjected under the rulers cannot be regarded a God-derived.

1.15 Human Rights in India:

The ancient Indian legal philosophy and administration of justice was purely based on the Hindu concept of "Dharma" and 'Neethi' where due justice was advocated to the entire creature. The meaning of the term human rights is quite unique in the Indian tradition. The concept of human rights encompasses everything that is essential for qualifying as a true human being.⁵¹ The long spell of foreign rule has transplanted the English system of law and administration into India and the present legal system is modeled on the line of English system. All the concerns for human rights and the developments in the International human right laws in the English system were adopted by the Indian system, during the British rule; with or without modifications.

The national movement in India was not a mere political movement. It had social and economic dimensions also which has bearing on the human rights. The leaders of the freedom movement cherished that the freedom must be political, social and economic. Therefore socio-economics issues were also in the forefront of the issues along with the political issues. The movements for abolition of Sati, Prohibition of child marriage, Welfare of Harijans and Girijans, Labour movements, efforts towards protection of women's right, equal opportunity and status for women, education of children of the underprivileged, literacy drive etc were the characteristic of the national movement. This has helped the independent India to legislate towards attaining these ideals in future and now India is no doubt one of the first countries in the world where the human rights ideals are most respected and best protected. The architect of Indian Constitution Dr. B.R. Ambedkar said that

⁵¹ Jhunjhunwala Bharat, *Governance and Human Rights*, Op. Cited p. 165

infringement of human rights must be called an offence. He further said, "Nobody can remove your grievance as well as you can and you cannot remove these unless you get political power into your hands. We must have a government in which men in power will not be afraid to amend the social and economic code of life which the dictates of justice and expediency so urgently call for".⁵²

It was momentous for India that the framers of its constitution were inspired by the Universal Declaration, for they saw the need for affirming them and suitably protecting them. The inspiration is evidenced in the Preamble to the Constitution and the protection of basic human rights (called the fundamental rights) in the body of the Constitution.⁵³

The preamble to the constitution of India enshrines the ideals of democracy, individual liberty, freedom, equality, and secularism. In order to achieve these and other objectives, the constitution laid down implementation procedure in Part III & IV as 'Fundamental Rights' and 'Directive Principles of State Policy' respectively. While the former guarantees certain rights to the individuals, later gives directions to the state to provide some other rights to its people in specified matters. Directives, though not enforceable before the courts, are not to be regarded inferior to the fundamental rights.⁵⁴ They should be construed in harmony with each other and every attempt should be made by the court to resolve apparent inconsistency, if any. If there is no apparent inconsistency between them, there is no difficulty in putting a harmonious construction, which advances the object of the constitution.⁵⁵

⁵² Chandra, Ramesh and Mitra, *Dalit Identity in the New Millennium*, New Delhi, Common Wealth Publishers, 2003, p. 290.

⁵³ Agarwal Nomita, *Jurisprudence*, Allahabad; Central Law Publications, 2001, p. 325.

⁵⁴ *Minerva Mills V. Union of India* : AIR 1980 SC 1789.

⁵⁵ *Keshvananda Bharati V State of Kerala* (1973) 4 SCC 225.

India's International obligation is explicit under Art 51, which pledges for international peace and security, and respect for international law and treaty obligations. India has also ratified the International covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural rights on March 27, 1979. India is one of the first signatories to the Universal declaration.

The courts in India played a proactive role and enlarged the scope and ambit of the fundamental rights, so as to cover all the rights which are not specifically provided in the constitutions. Krishna Iyer J in *Sunil Batra V Delhi Administration* says "today human right jurisprudence in India has constitutional status."⁵⁶ In the recent decisions of the Supreme Court extensive reference to Human Rights can be found.⁵⁷ Now there is hardly any right, which is alien to the constitution of India.

⁵⁶ AIR 1980 SC 1579

⁵⁷ Pandey J.N, *Constitutional Law of India*, Allahabad, Central Law Agency, 2003, p. 52.

CHRONOLOGY OF EVENTS⁵⁸

As this chapter is dedicated for the analysis of the historical perspective, it is felt necessary to present a chronology of major events in the development of human rights at the International level.

- 1941 President Frankline Roosevelt's State of the Union message includes one of the first reference to the "Four Freedoms"- freedom of speech, freedom of religion, freedom from want, and freedom from fear-freedoms that, he states, should prevail everywhere in the world.
- 1944 Declaration of Philadelphia. Two famous passages are incorporated into the constitution of the International Labour Organization (ILO), a specialized agency of the United Nations: "All human beings, irrespective of race, creed, or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security, and equal opportunity"; and "Freedom of expression and association are essential to sustained progress".
- 1945 Preamble to the U.N. Charter. Includes the phrase "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women, and of nations large and small"- one of the first times human rights are mentioned in an international treaty.

⁵⁸ Redman and Whalen, *Human rights – A Reference hand book* : Op. Cit. p.p.32-44 also www.beepworld.de also www.kwashi.wednet.edu/lusd; www.g.cubed.info

- 1946 The U.N. General Assembly approves and ratified the Nuremberg Principles, which establish the right and authority of nations or punish violations of human rights and specify that soldiers may not be acquitted on the grounds of following orders of superiors when they violate the rules of war.
- 1948 The U.N. General Assembly adopts the Universal Declaration of human Rights, which prescribes that all human beings are entitled to all human rights and fundamental freedoms set forth in the declaration. This is the most fundamental of all U.N. instruments; most subsequent human rights statements are based on its tenets.
- 1949 American Declaration of the Rights and Duties of Man, based on the Universal Declaration of Human Rights, brought into existence by the Organization of American States (OAS) in Bogota and adopted for Latin America.
- International Labour Organization (ILO) adopts the Right to Organize and Collective Bargaining Convention, prescribing for workers adequate protection against antiunion discrimination in respect of their employment.
- 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation or the Prostitution of Others. The convention parties agree to punish any person who, to gratify another, procures, entices, or leads away, for the purpose of prostitution, another person, even with that person's consent, or exploits the prostitution of another person, even with the person's consent.

- 1951 Convention Relating to the Status of Refugees. Parties agree to give refugees "national treatment"- that is, treatment at least as favorable as that accorded their own nationals with regard to such rights as freedom of religion, access to courts, elementary education, and public relief. (Convention covers only persons who become refugees as a result of events occurring before January 1, 1951.)
- 1952 Convention on the International Right of Correction. Provides that when a signatory state finds a news report filed between countries or disseminated abroad capable of damaging its foreign relations, or national prestige, that state may submit its version of the facts to any other states where the report became publicized, and that these other states are obliged to release such a communiqué to news media within their territories.
- 1953 European Convention for the Protection of Human Rights and Fundamental Freedoms. Requires contracting states to make their laws conform to the provisions of the convention and creates the European Court of Human Rights.
- 1955 Standard Minimum Rules for the Treatment of Prisoners. These seek to set standards for acceptable treatment of prisoners and management of penal institutions.
- 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery. Requires parties to expedite, through legislative and other measures, the complete abolition of such practices as debt bondage, serfdom, and the use of a woman, without the right to refuse, as an object of barter in marriage.

1957 Convention on the Nationality of Married Women. Contracting states agree that neither celebration nor dissolution of marriage between a national and an alien can automatically affect the nationality of the wife.

Convention concerning the Abolition of Forced Labour (ILO). Members agree not to use any form of forced or compulsory labor as a means of political coercion or education or as punishment for holding political views ideologically opposed to the established system.

1958 Discrimination (Employment and Occupation) Convention (ILO). Each ratifying member agrees to declare and pursue a national policy promoting equal opportunity and treatment in employment and occupation, with a view to eliminating any discrimination in respect thereof.

1959 The Organization of American States (OAS) creates the Inter-American Commission on Human Rights to Promote respect for human rights. The commission asserts its authority to study the human rights situations of member states.

Declaration of the Rights of the Child. Maintains that children shall enjoy special protection and be given opportunities and facilities, by law and other means, to enable them to develop physically, mentally, morally, spiritually, and socially in a healthy and normal manner in conditions of freedom and dignity.

- 1960 Convention against Discrimination in Education (UNESCO). Parties agree to ensure, by legislation where necessary, that there is no discrimination in the admission of pupils to educational institutions; to make primary education free and compulsory; to make secondary education generally available and accessible to all, and higher education equally accessible to all on the basis of individual capacity; and to make certain the factors relating to the quality of education provided are equivalent in all public education.
- 1961 Convention on the Reduction of Statelessness; Specified grounds on which a state may not deprive a person of nationality; these include racial, ethnic, religious, or political reasons.
- 1962 Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages. States must take legislative action to specify a minimum age for marriage and to provide for the registration of marriages by an appropriate official. Marriages may not be legally entered into without the full and free consent of both parties.
- 1963 Declaration on the Elimination of All Forms of Racial Discrimination. Discrimination against human beings on the grounds of race, color, or ethnic origin is an offense to humanity and shall be condemned as a denial of the principles of the Charter of the United Nations, as a violation of the fundamental freedoms proclaimed in the Universal Declaration of Human Rights, and as an obstacle to friendly and peaceful relations among nations. Special measures shall be taken in appropriate circumstances to secure adequate protection of individuals belonging to certain racial

groups, but these measures may not include the maintenance of unequal or separate rights for different racial groups.⁵⁹

1964 Employment Policy Convention (ILO). Parties to the convention must declare, and pursue, as a major goal, an active policy designed to promote full, productive, and freely chosen employment.

Civil Rights Act of 1964. Signed by President Lyndon B. Johnson, the act is a landmark in the development of full human rights for all citizens in the United States.

1965 International Convention on the Elimination of All Forms of Racial Discrimination. The convention condemns racial discrimination and undertakes to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms, to promote understanding among the races, and to discourage anything that tends to strengthen racial division.

1966 International Covenant on Economic, Social and Cultural Rights. States recognize rights to which all people are entitled, including the right to work, to just and favourable conditions of work, to social security, to an adequate standard of living, to the highest attainable standard of physical and mental health, to education, to take part in cultural life, and to enjoy the benefits of scientific progress
International Covenant on Civil and Political Rights. Established a legal obligation on states to protect the civil and political rights of every individual without discrimination

⁵⁹ *International Women's Rights Action Watch*. USA: University of Minnesota.

as to race, sex, language, or religion. It ensures the right to life, liberty, security, individual privacy, and protection from torture and other cruel, inhuman, or degrading treatment. The covenant also guarantees a fair trial and protection against arbitrary arrest or detention and grants freedom of thought, conscience, and religion, freedom of opinion and expression, and freedom of association.

Optional Protocol to the International Covenant on Civil and Political Rights. A state party to the International Covenant that becomes a party to the Optional Protocol recognizes the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of violation by the state party of any of the rights set forth in the covenant.

1967 Declaration on the Elimination of Discrimination against Women. All appropriate measure shall be taken to abolish existing laws, customs, regulations, and practices that discriminate against women and to establish adequate legal protection for equal rights of men and women.

Declaration on Territorial Asylum. Asylum granted by a state to persons seeking asylum from political persecution shall be respected by all other states. No such person shall be subjected to such measures as rejection at the border, expulsion, or compulsory return to any state where he or she may be subjected to persecution except for overriding reasons of national security or to safeguard the population.

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. The

Convention states principles regarding international cooperation in the detention, arrest, extradition, and punishment of war crimes and crimes against humanity; for example, there is no statutory limitation on certain crimes such as genocide, eviction by armed attack, or inhuman acts resulting from the policy of apartheid.

1969 The American Convention on Human Rights. Signed in San Jose, Costa Rica, but not brought into force until 1978, this is one of the most ambitious and far-reaching documents on human rights issued by any international body. Among other features, it bans the death penalty and authorizes compensation for victims of human rights abuses in certain cases. The ILO receives the Nobel Peace Prize for its work on behalf of human rights. The ILO was the first international governmental agency, under the League of Nations, to define and vindicate human rights. It has sought tirelessly to improve the conditions of working men and women around the world.

1971 Declaration of the Rights of Mentally Retarded Persons. The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings, including the right to proper medical care, to education and training, to economic security, and to a decent standard of living.

Workers' Representatives Convention (ILO). Workers' representatives shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their participation in union activities, insofar as they act in conformity with existing laws or other jointly agreed-upon arrangements.

1973 International Convention on the Suppression and Punishment of the Crime of Apartheid. Inhuman acts resulting from the policies and practices of apartheid and similar policies of racial segregation and discrimination are crimes that violate the principles of international law and constitute a serious threat to international peace and security.

1974 Universal Declaration on the Eradication of Hunger and Malnutrition (World Health Conference). All men, women and children have the inalienable right to be free from hunger and malnutrition in order to develop fully and maintain their physical and mental faculties. The eradication of hunger is a common objective of all countries, especially of those in a position to help in its eradication.

Declaration on the Protection of Women and Children in Emergency and Armed Conflict. All states involved in armed conflict or in military operations either in a foreign country or in territories still under colonial domination must make special efforts to spare women and children from the ravages of war.

1975 The Helsinki Agreement or the Final Act of the Conference on Security and Co-operation in Europe. Signed in Helsinki by 33 nations and the 2 superpowers-the United States and the Soviet Union-the Helsinki Accords, as they came to be called, pledged respect for human rights and fundamental freedoms including the freedom of thought, conscience, religion or belief, for all people without distinctions as to race, sex, language, or religion. The signatories agreed to promote universal and effective respect for human rights,

jointly and separately, including cooperation with the United Nations.

International Women's Year and the First World Conference for the Decade for Women in Mexico City. Marks the beginning of the most profound consideration of women's rights on a worldwide basis that has ever taken place.

1977 The Carter administration emphasizes human rights. In his inaugural address, Jimmy Carter makes it clear that human rights will be an important factor in U.S. foreign policy. In a speech to the United Nations two months later, he stated that he will recommend the ratification of the major human rights treaties. Although he keeps his promise, the human rights treaties are not ratified by the United States. He does, however, create the Bureau of Human Rights and Humanitarian Affairs and appoints Patricia Derian to head the bureau.

1978 Declaration on Race and Racial Prejudice (UNESCO). All individuals and groups have the right to be at difference, but this right and the diversity in lifestyles may not, in any circumstances, be used as a pretext for racial prejudice and may not either in law or in fact justify discriminatory practices.

Declaration on Fundamental Principles concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights, and to Countering Racism, Apartheid, and Incitement to War (UNESCO). Journalists must have access to public information for reporting so that individuals may

Incitement to War (UNESCO). Journalists must have access to public information for reporting so that individuals may have a diversity of sources from which to check the accuracy of facts and appraise events objectively.

1979 Code of Conduct for Law Enforcement Officials. In the performance of their duties, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons. They may use force only when strictly necessary and to the extent required for the performance of their duty. They may never inflict, instigate, or tolerate any act of torture, or other cruel, inhuman, or degrading treatment, nor invoke superior orders or exceptional circumstances as a justification for such treatment.

Convention on the Elimination of All Forms for Discrimination against Women. Parties shall take all appropriate measure, including legislation, to ensure that full development and advancement of women, for the purpose of guaranteeing them in the exercise of human rights on a basis of equality with men.

1980 Second World Conference for the Decade for Women. Conference held in Copenhagen to assess the progress made in implementing the 1975 Mexico City conference's plan of action and to adopt guidelines for international, regional, and national efforts to assist women in attaining equality in all spheres of life as part of a plan of action for the second half of the decade.

1981 UNESCO meeting in Freetown, Sierra Leone. A meeting of

experts to analyze the forms of individual and collective action by which human rights violations can be combated.

African Charter on Human and Peoples' Rights. At a meeting of the Organization of African Unity (OAU), the leaders of 51 member states adopt the African Charter on Human and People's Rights. The charter reiterates the basic principles of human rights and stresses decolonization and the elimination of apartheid as top priorities. It seeks to preserve the traditional African social concept that the individual is not considered independent from society but is subordinate to the group.

Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. All persons shall have the right to have a religion or belief of their choice, and shall have the freedom, either individually or in community with others and in public or private, to manifest their religion or belief in worship, observance, practice, and teaching.

The Universal Islamic Declaration of Human Rights. Many of the provisions of this declaration are similar to those in other major human rights instruments; the declaration contains references to the right to life, to freedom under the law, to equality before the law, to fair trial, and to freedom from torture. Its basis is religious rather than regional and draws justification from reference to the Koran and the *sunna*.

1982

Principles of Medical Ethics. Health personnel particularly physicians, charged with the medical care of prisoners and

detainees, have a duty to provide for them the same standard and quality of physical and mental medical health care afforded others. It is a gross violation of medical ethics to engage actively or passively in acts that constitute participation in or complicity with torture or other cruel, inhuman, or degrading treatment or punishment.

1984 Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. Defines torture as any act by which severe physical or mental pain or suffering is internationally inflicted by, at the instigation of, or with the acquiescence of someone acting in an official capacity, whether to obtain information or confession; to punish, intimidate, or coerce; or for reasons based on discrimination. The convention states that parties must prevent torture in their jurisdictions and ensure that it is legally punishable.

1985 Third World Conference for the Decade for Women. Held in Nairobi in July 1985 to assess the progress achieved and obstacles encountered during the past decade and to formulate strategies for the advancement of women to implement through the year 2000 and beyond. International peace and security will be advanced by the elimination of inequality between men and women and the integration of women into the development process.

1986 United Nations Declaration on the Right to Development. Declare individuals to be the center of all economic activity. Therefore development efforts must improve the well-being of the entire population, not just increase economic indicators.

1988 Almost 40 years after the United Nations approved the

Genocide Convention, President Reagan signs legislation enabling the United States to become the 98th nation to ratify the agreement. The legislation amends the Criminal Code of the United States to make genocide a federal offence.

- 1989 Convention on the Rights of the Child. Declares the responsibility of all nations to provide adequate nutrition, education, and health care for the world's children. Other provisions govern child labor, juvenile justice, and child participation in warfare.
- 1990 The General Assembly of the United Nations adopts the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The convention provides for the establishment of a committee to oversee protection of migrant worker rights.
- 1992 The General Assembly of the United Nations adopts the Declaration on the Rights of Persons Belonging to National, Ethnic, Religious, and Linguistic Minorities. The declaration calls on states to protect the existence and the national, ethnic, cultural, religious, or linguistic identities of minorities living in their territories.
- 1993 Declaration on Violence against Women. Calls on governments to exercise diligence to prevent, investigate, and punish acts of violence against women. World Conference on Human Rights in December 1993 declares that the human rights of women and girl children are an inalienable, integral, and indivisible part of universal human rights.

The U.N. Security Council officially names Srebrenica the world's first U.N.-protected civilian safe area. Unfortunately, the United Nations does not send sufficient troops to the area and over 7,000 Muslims are slain.

The United Nations responds to human rights violations throughout the world by adopting the Vienna Declaration and Programme of Action at the U.N. World Conference on Human Rights, which reaffirms its commitment to previously recognized human rights, with special recognition of the right to development and to economic, social and cultural rights . It also calls for an end to discrimination, violence, and poverty.

1994

The United Nations drafts the Declaration on Human Rights and the Environment. This document focuses on the right to benefit from nature, to consume safe and healthy food, and the right to a healthy environment. The United Nations proclaims the decade 1995-2005 the Decade for Human Rights Education. The purpose of this proclamation is to broaden awareness of human rights and make human rights education a part of the curriculum.

The U.N. Security Council adopts a resolution re-emphasizing that "ethnic cleansing" constitutes a clear violation of international law. This echoes a 1992 Security Council resolution condemning "ethnic cleansing" in Bosnia and Herzegovina.

The U.N. Security Council establishes in International Tribunal for Rwanda. Eight hundred thousand people are killed in Rwanda in one of the worst genocides since the Nazi Holocaust.

1995 Fourth U.N. World Conference on Women. Held in Beijing in September 1995, the conference focuses on the economic empowerment of women and addresses continuing inequalities in the areas of health care, education, and political participation. The conference has spurred legislative efforts worldwide to enhance the rights and role of women.

South Africa established the Truth and Reconciliation Commission to investigate human rights abuses that took place under the apartheid government. Archbishop Desmond Tutu is appointed head of the commission by President Nelson Mandela.

1997 An international treaty is negotiated among 89 countries in Oslo, Norway, to ban antipersonnel land mines. The world has more than 100 million unexploded land mines, which kill or cripple 26,000 annually.

1999 Optional Protocol to the CEDAW.

2000 Optional Protocol to the convention on the rights of child on the involvement of children in armed conflict.

Protocol to prevent, trafficking in persons especially women and children.

Protocol against struggling of migrants.

- 2001 Protocol against illicit manufacturing of and Trafficking in firearms.
- 2002 Convention on sustainable development.
- 2003 Convention against Transitional Organized Crimes and Terrorism 2003.
- 2004 Treaties on the Protection of civilians.

CHAPTER - II

FEMALE HUMAN RIGHTS - THE INTERNATIONAL AND NATIONAL PERSPECTIVES

CHAPTER - II

FEMALE HUMAN RIGHTS

INTERNATIONAL AND NATIONAL PERSPECTIVES

When we talk about the human rights of female we shall first enquire into the scope and ambit of the term female. The term 'female' is determined as "the sex, which conceives and give birth to young. Also a member of such sex. The term is generic, but may have the specific meaning of 'women' of so indicated by the context. The term women is defined as "all such females who have arrived at the age of puberty".¹ A female includes a girl or women.² The word 'woman' means the female part of human race.³ Under section 10 of Indian Penal Code the word women denotes a female human being of any age.⁴ In **Emperor V Tatia Mahadev** (1912) 14 Bom. L.R. 961 it was held that a female child to be a women with in the meaning of law.

The subject of study is the human rights entitled by all females; right from the time of conception and includes an unborn foetus and the theme is based on female foeticide which is a gross violation of human rights and crime against the unborn female child. In the title the term 'female' is used it is done so as to acquire a wider ambit for the concept of women's human rights. An effective way of studying as to what are the women's human rights can be made through studying the rights they are being deprived of. The deprivation is on the basis of sex which commonly accord women less favourable treatment than men. This sex based discrimination derives in large part from an arbitrary division of male and female roles.⁵ The conceptual equality in real life is hypothetical as both man and women are competent to perform duties

¹ *Black Law Dictionary* p.744, p.1779

² *The lexican Webster's dictionary*, Delair Publishing Company, 1986, p. 359.

³ *The New International Webster's Dictionary*, New Delhi : CBS Publishers, 2001, p.660.

⁴ Battacharya. T, *Indian Penal Code*: Allahabad : Central Law Agency, 2001, P.8.

⁵ Agarwal Nomita, *Jurisprudence*, Allahabad: Central Law Publications, 2001, p. 327.

and sacrifices.⁶ In real life, women of all communities experience hardships and suffering whether minority or majority, poor or rich, educated and uneducated. Female foeticide, discriminating treatment meted out of girls at home and the husband's and his family's effort to control the newly wed bride by various inhuman methods for dowry illtreatment to widows and divorcee women in human killing of girls are prevalent in a wider section of the society.⁷

'Gods dwell there where women are respected' says an old Indian Proverb.⁸

"Poojaneeya mahabhagah : punyaschya gruhadeepthyah

Shreeya : Shreeyao gruhasyosthmadarkshaya viseshathah"⁹

- Vidur Nithi

The above verse is the concept about the women in the ancient Indian culture. It depicts the importance of the protection of women and casts upon the society a duty to protect them. However, in the modern world the women suffer from a lot of disabilities and handicaps all over the world. The women are equally entitled for the human rights like men but the acts of violence range from battering, assault, incest and rape world wide to female circumcision in Africa, dowry death and female foeticide in India, and militarisation in Phillipines. A recent study in Kenya has reported that 42 percent of women were regularly beaten by their partners. Similar were the findings in case of Sri Lanka. Women all over the world face violence in one or other form with varying degrees.¹⁰

⁶ Milter, D.N, *Position of Women in Hindu Law*, New Delhi : Inter India Publications, 1984, p.65.

⁷ Pandey V.P, *Problems of Women's Marriage and violence*, New Delhi : Mohit Publications, 2002, p.1

⁸ Deb R, *Criminal Justice*, Allahabad : The Law Book Co., 1998, p. 259.

⁹ Brochure, *Thus spoke Puranas*, Kanyakumari: Vivekananda Kendra, 1993,

¹⁰ Shah G and Gupta K.N, *Women and Human Rights*, Op. cited p. 127.

The women's rights and women's movements cannot isolate itself from the realities of the time. To begin with the process, it would be interesting to have a glance at the status of women's rights under the ancient Hindu Law.

2.1 Womens' Rights Under the Ancient Hindu Law:

The law in India was written from 5th century BC to 18th century AD by a number of *Smritikars* and commentators who regulated social relationship for society. They were neither political leaders nor religious heads but philosophers, social thinkers and teachers. Their writings were not scriptural texts. They preached *dharma* a code of conduct governing all aspects of life. The *Smritikars* right from *Gautama* and *Manu* in around 5-3 century B.C acknowledged a concept of property ownership which they called *Streedhana* – woman's exclusive property.¹¹ The most distinguishing feature of *streedhana* property was that it devolved firstly on unmarried daughters then married daughters. Next in the line was the daughter's daughters followed by the daughter's son. The woman's son could inherit only in the absence of heirs in the female lineage¹². This concept was accepted by all *Smritikars* and commentators. While *Manu* laid down six forms, *Katyayana* added 5 more and *Yagnavalkya* expanded its scope by using the term *adi* meaning 'etcetera'. The *Mitakshara* (11th century AD) which is the most widely recognized source of the present Hindu law, spelt out the concept in clear terms. While the sages differed on the exact definition of the term they were unanimous in holding that gifts and ornaments received from the husband constitutes a woman's *Streedhana*.¹³

¹¹ Reddy G.B. *Women and Law*, Hyderabad; Gogia Law Agency, 2001, p.44.

¹² *Mulla's Principle of Hindu Law* (16th Edition) p. 158

¹³ *Ibid* p.p. 172-173

The second concept accepted by all *Smritikars* was that customs overrode the written text of law.¹⁴ The famous quote of Brihaspati '*Deshe desheya acharah paramparayakramagaleh; sa shastrarhabalavanaiva langhaniyah kadhachava*' exhorts recognition of local, tribal and family usages. This provided the society with fluidity and pluralism. The actual laws followed by the people were a mixture of interpretations by commentators and local customs. This gave ample scope for the development of a fluid and pluralistic society. Hence strong patriarchal practices like '*Niyoga*' (a widow forced to marry her brother-in-law) and '*Sati*' could coexist with practices of lineage and inheritance through the female line (e.g. *Aliyasanthana* and *Marumakkathayam* of the Malabar coast). So there was ample fluidity in laws and customs.¹⁵

The word Hindu is not found in any of the *Smritis*. The laws and customs applied to people locally, regionally or along caste lines.¹⁶ They weren't applicable on a religious divide. For instance, the later religions like Buddhism, Jainism etc which preached a different philosophy, did not evolve a code to govern family relationships or property inheritance. Their precepts were more spiritual than material. This resulted in people following the same laws of inheritance and succession, irrespective of their religious affiliations in some, localities or regions.¹⁷ So we have a situation prior to 18th century, where, Muslims, Christians and various denominations of Hindus of one region following similar laws of marriage and succession.

¹⁴ Ibid 57 '*Achara, Sadachara, Shishtachara Loksangraha*' denotes custom. Gautama, Manu, Narada have stated that custom is powerful and overrides the sacred law. The famous quote of Brihaspati '*Deshe deshe ya acharah paramparayakramagaleh; sa shastrarhabalavanaiva langhaniyah kadhachava*' exhort recognition of local, tribal and family usages. The Privy Council decision in Collector of Madhura V Moottoo Ramalinga (12 M.I.A. 397,436) held 'clear proof of usage will outweigh the written text of law'

¹⁵ Agnes Flavia, *Towards Secular India; Journal of Centre for Study of Society and secularism*, Vol.II, 1996.

¹⁶ *Mayne's Hindu Law and Usage* : 13th Edition Pg. 4 See also the decision of the Supreme Court in Yagnapurushdasji V Vaishya AIR 1966 SC 1119.

¹⁷ For instance, Khojas and Kutchi Memons of Gujarat followed the ancient Hindu Law of succession. In North Malabar. Marumakkathayam, a matriarchal law of succession applied to Hindus and Muslims. (Vasuda Dhagamwar, 1989 Towards the Uniform Civil Code Pg. 3-4).

The Muslim rulers did not interfere with local customs and civil laws although they introduced the Islamic criminal courts.

2.2 The British Rule and the women rights in India:

During the initial phase, the East India Company and later the British Crown followed a policy of non-interference with religious beliefs and traditions. On the assumption of power by the Queen of England, Queen Victoria made a declaration of policy:

*'... We do strictly charge and enjoin all those who may be in authority under us that they abstain from all interference with the religious belief or worship of any subject on pain of our highest displeasure.'*¹⁸

But in spite of this policy the colonial rulers through judicial decisions as well as legislations intervened in the realm of family and social relationships. The first known law reform of this period is the much-published Bengal Sati Regulation Act of 1829. This was followed by other legislation such as the Widow Remarriage Act of 1856, the Child Marriage Restraint Act of 1929 etc.

This penal legislation focussing on women's welfare conveyed an impression that the exception to the rule of non-interference in religious belief was for the benefit of women. There was a presumption that by incorporating the concepts of modernity into the native jurisprudence, the status of women in India was alleviated.

Through these interventions the colonial rulers assumed the role of commentators and interpreted the ancient texts. By over-emphasizing the texts, they undermined the role of custom as an important source of

¹⁸ Sathe S.P, *Towards Gender Justice, Journal of Centre for Study of Society and Secularism*, 1996, p.7

law. At this stage, the process of evolving laws at the local level through commentaries and customs was arrested. The interpretation of the ancient texts¹⁹ by colonial rulers became binding on the native and made the law certain, rigid and uniform. This could have been welcomed as a positive intervention if only these notions of modernity benefited women.

But the British intervention did not stop at the level of welfare legislation for women but extended to two other spheres which have not received due attention. At one level they carved out a space for men's individual property rights into a system based on joint family property.

But what is even more disturbing is that through a series of judicial decisions during the period 1860 to 1930 the Privy Council thwarted the concept of *Streedhana*.²⁰ The courts held that whether the property is inherited through her male relatives (father, son, and husband) or through her female relatives (mother, mother's mother, daughter) it is not her *Streedhana*.

To explain the point further a typical case can be illustrated. The woman had inherited the property from her mother. After her death, her sons claimed the property as heirs of the mother and grandmother, and deprived their sister. In a case filed by the sister, the subordinate judge of Gorakhpur, on 7th December 1897 held that the property was the woman's *Streedhana* and hence the woman's sons had no right over it. The brothers filed an appeal in the Allahabad High Court which reversed the judgement. This resulted in an appeal to the Privy Council. In February, 1903 the Privy Council upheld the decision of the High Court.²¹

¹⁹ Lata Muni, 'Contentious Traditions: The Debate on Sati in Colonial India' in *Recasting Women, Essays in Colonial History* Ed. Kumkum Sangari and Sudesh Vaid. Kali for Women, 1989, p. 88.

²⁰ *Ms. Takur Deyahia vs Rai Balut Rao*, 1866, *Bhagawandeen V Myna Baee*, 1867, *Ram Gopal V. Narain*, 1906, *Debi Mangal Prasad V. Mahadeo Prasad*

²¹ Shah and Gupta; *Op. Cited*. p. 127.

Perhaps it is pertinent to raise the question, 'Why did the judicial decisions of the British Crown adversely affect women's rights?' to answer this question we would have to probe into the concepts regarding the women's status which the Lords of the Privy Council held. The decisions of the British courts on women's issues during this period would be an indicator. Unfortunately, these decisions reveal that the concept of modernity upon which the Anglo-Saxon jurisprudence rested did not encompass a concept of women's right.

In the nineteenth and early twentieth century, women in Britain could not vote, married women could not own property, and they did not exist... legally! As soon as a woman got married she lost her legal identity. She could not even enter into a contract. Her identity merged with that of her husband's. Since the husband was the woman's guardian he had a right to chastise her within 'reasonable' limits. He could beat her with a stick not thicker than this thumb within 'reasonable' limits under a legally accepted notion called 'thumb rule'.²²

On a broader social level, there were several decisions, which held that women could not enter universities, that they were not persons, that the term 'he' does not include 'she'. These 'persons' cases as they came to be called were launched by feminists in the hope that their arguments needed merely to be stated to be upheld, namely that an individual gender was irrelevant to his or her factual or legal capacity and that females were obviously to be include in the word 'person'. What was self-evident truth to feminists, however was absurdity of the judges.²³ After a prolonged and sustained campaign by the suffragettes, finally in 1929 the courts granted women the right to be 'persons'.²⁴ The women

²² Agnes Flavia. Op. Cit : at p.8.

²³ Sachs and Hoff Wilson, *Sexism and the Law*, London : Universal Publication, 1967, p.61

²⁴ Canadian Senators Case – Edwards vs Attorney-General – the Privy Council in London finally acknowledged that women fall within the term 'Person' , 1929,

obtained the right to own property through legislation in 1882 and the right to vote in 1918.

Under the guise of modernity, the British judges introduced similar concepts within the Indian jurisprudence. It is these concepts that gained uniformity, certainty and rigidity. The decisions of the Privy Council became legal precedents binding on the lower judiciary. Indeed, these decisions were quite reactionary when compared to the level of women's rights prevailed in India at that time.

2.3 Evolution of 'Personal Laws:

After the Queen's Proclamation of 1858, the British Parliament initiated a process of law reform in India. Several legislations were passed during the period 1860-1870 to introduce the Anglo-Saxon jurisprudence.²⁵

Two important legislations which form the basis of present day judicial system were enacted during this period – the Indian Penal Code and the Indian Contract Act. These were important enactments, which enabled the British Crown to consolidate its political power by laying down uniform laws for civil transactions and for governance of crime and punishment²⁶.

It was at this juncture that the term 'personal' was introduced into the legal sphere. In a strict legal sense there are only two broad categories of laws – civil and criminal – and laws by their very nature are public. But the colonial rulers made a distinction between 'public' and 'personal' sphere of men's life and left the 'personal' domain out of the realm of uniform legislation, for fear that this would give rise to unnecessary conflict and unrest. This pattern of distinguishing between the personal

²⁵ Agnes, Flavia, *The Hidden Agenda Beneath The Rhetoric of Women's Rights*. Journal of Centre for Study of Society and Secularism Vol. 2, 1996, p.9.

²⁶ Ibid: at p.9

and public arena continues to this day. The freedom to regulate the 'personal' or 'domestic' sphere was offered as a carrot to the native men so that there was an easy acceptance of the political rule in public life. In the present context it is used for appeasing the religious minorities.

Laws governing marriage, divorce, inheritance, succession, adoption etc. are termed as 'personal'. Further, it is deemed that the personal laws are 'religious' although most of them are State enacted. The first legislation, which was enacted along religious lines, was a law to regulate Christian marriage and divorce. Although the first act regulating divorce was meant primarily for European Christians, it had a secular sounding title 'The Indian Divorce Act, 1869'. But a separate act to govern marriage which was passed three years later incorporated the word 'Christian' in its title - 'The Indian Christian Marriage Act, 1872'.²⁷

That the Act was meant primarily for European Christians was indicated by the incorporation of a separate section, which laid down the formalities for a native Christians Marriage. The Act was based on the British law - the Matrimonial causes Act of 1857 - which transferred matrimonial jurisdiction from essential courts to the civil courts. The law reflected a rigid Victorian code of morality. But in spite of these limitations, it was a historical moment when a small section of Indian women got the right to divorce through state enactment. This was a progressive act for its times considering the fact that the Hindu women were granted this right after much debate and opposition, almost a century later in the year 1955.²⁸

Around this time, leaders of the progressive reform movements raised a demand for civil law concerning marriage. In spite of the opposition from

²⁷ Ibid : at p.9

²⁸ The Hindu Marriage Act, 1955. Sec. 13

the conservative sections, the Special Marriage Act, 1872 was passed providing an opportunity for Indians to contract a civil marriage. But the parties had to clearly declare that they have ceased to practice their religion. This was a hindrance as people who wanted to opt for a civil ceremony were not always willing to renounce their religion. So, in 1912, a demand was made for the deletion of this provision, but was not conceded. But later, through an amendment in 1923, this clause was deleted.

Since 1923 people could marry without renouncing their religion but once they contracted a civil marriage for the purpose of inheritance they could not avail of the religious laws and had to be governed by the Indian Succession Act of 1925. This was another secular and prowomen law passed during the British era which gave women equal property rights. The Act of 1925 can be considered as the most progressive piece of legislation even when tested against the present day parameters of women's rights. But unfortunately, these two important legislations based on secular and non-sexist principles were not further developed to evolve a uniform civil code.²⁹

The next important law reform took place in late thirties. The Government of India Act 1935 provided an opportunity for nationalist leaders to bring in law reform in the realm of personal laws. A legislation in 1937 – the Hindu Married Women's Property Rights Act provided married women with a limited right of life interest in their husband's property but it did not give them a right to alienate the property. The right was illusory and did not substantially change the status of women. Further, it did not provide any right to women as daughters.³⁰

²⁹ Ramanan. R.P, *Human Rights of Women*, Kottayam : Current Books, 1999, p. 129.

³⁰ Ramanan R.P. Op. Cit. : at 103.

Around this time two important legislations were passed in the realm of Muslim personal law – the Application of Shariath Act 1939 and the Dissolution of Muslim Marriage Act 1939.³¹

Both these laws claimed to improve the status of women within Islam. It was stated that the customary law gave women lesser rights and the application of Shariah would raise their status, to which they were naturally entitled under Islam. But there was a hidden agenda – of unifying and strengthening Islam. This was the period when the two-nation theory was being propagated, and a uniform law was an essential step towards unifying the community.³²

The Dissolution of Muslim Marriages Act, 1939 was enacted to prevent women from apostatizing in order to obtain a divorce. But one of the main reasons mentioned in the statement of Objects and Reason was to alleviate the ‘unspeakable misery caused to Muslim women’. But the act does not deal with issues which are of crucial importance to women and which form part of all matrimonial legislations i.e. alimony, maintenance and custody of children. The act merely provides women with the right to divorce their husbands.³³

Around this time the women who were in the forefront of the nationalist movement raised a demand for formulating a comprehensive code regulating marriage, divorce and inheritance. The demand was first raised by Kamaladevi Chattopadhyay, Sarojinidevi Naidu and others in the twenties and repeatedly raised several times during the thirties. But the political developments necessitated a reformulation of the demand in the form of Hindu Law Reform with a limited objective. Although in 1941 and in 1944 committees were constituted to prepare draft legislation,

³¹ Mohammad T. *The Muslim Law in India*

³² Shams S. *Women, Law and Social Change*, New Delhi : Ashish Publishing House, 1991.

³³ Mulla, *Principles of Mohammedan Law* 1990, Forward by Thripathi, Bombay, p. 233

broader political considerations arising out of freedom struggle and Quit India Movement overrode a law reform for Hindu women. After independence the Constitution and other Statutes have made significant contributions for protecting the womens' rights. Before taking up a discussion on it, the womens' rights and its developments at International level require a special mention.

2.4 Women's Right and International Law:

The statement, "Women Rights Are Human Rights" means that the human rights of women are an inalienable, integral and indivisible part of universal human rights. That is, they cannot be divided, isolated or separated from human rights issues. The human rights of women are integral and indivisible because women are affected by all the human rights issues in every area, as women and as people. That is, they are affected both in gender specific way and also in a general way, as part of the various populations of the world. Therefore, the full and equal enjoyment of fundamental freedom by women is a priority for government and the United Nations. It is essential for the advancement of women.³⁴

The view that women's rights are human rights became popular with the growing public awareness of the many serious problems of women that had previously been neglected. The years that followed saw the successful integration of women's concerns into different aspects of human rights, be it a question of health or education or development and environment. There has been a mainstreaming of gender issues in all meetings and conferences of the U.N. and other bodies. The World Conference on Human Rights at Vienna in 1993 reaffirmed clearly those human rights. The International Conference on Population and Development at Cairo in 1994 reaffirmed women's reproductive rights and the right to development.

³⁴ Ajitha K, '*Women's Movement in India*', Trivandrum : Prabhat Books, 1989, p. 227.

The women's movement all over the world promotes an understanding that women must bring their perspectives to bear on different issues. Women have focused in particular on gender specific issues like violence against women and demanded that they be considered as human rights issues. It would be worthful to quote Mrs. Usha Narayana, the first lady of India, as she was then, who declared in unequivocal terms while addressing a seminar organized by the U.N. Information center that "Womens rights are human rights said that if human rights in all its aspects were to be practically realized political empowerment was essential.³⁵ However, many cases of violence against women in the private domestic sphere is not taken up by various human rights bodies and also not accepted as human rights abuses. Notably woman's organizations all over the world have attempted to integrate such women's specific issues that have been ignored so far, into human rights concerns.³⁶

2.5 Female Human Rights and The U.N.O:

The aims of the Charter of the United Nations signed on 26 June, 1945 are expressly based on universal respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.³⁷

The Commission on Human Rights established in 1946 also included an Article entitling every person, "to all rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex or social origin, property, birth or other status". The Commission on the Status of Women was established in 1946 to promote women's political, economic and social rights and for formulating global policies and

³⁵ Jain Anita, *Education and Empowerment*, New Delhi : Gyan Publishing, 1998, p. 141.

³⁶ *Human Rights Tribune*, June 1993. (Editorial)

³⁷ Mishra Jyotsna, *Women and Human rights*, Kalpaz Publication, 2000, p. 219.

recommendations for the advancement of women. Apart from these, the Convention for the suppression of the "Traffic in Persons and of the Exploitation of the Prostitution and Others" was adopted in 1949 by the U.N. In 1952 the General Assembly adopted a Convention on Political Rights of Women, the first global endorsement of equal political rights under the law.³⁸

The two Covenants that were adopted in 1966, "International Covenant on Economic, Social and Cultural Rights" and "International Covenant on Civil and Political Rights" guaranteed that the rights enunciated in these Covenants "will be exercised without discriminations of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin property, birth or other status". The Covenants also ensure that equal right of men and women to the enjoyment of all economic, social and cultural rights and of all civil and political rights.³⁹

The "Declaration on the Elimination of All Forms of Discrimination Against Women" adopted in 1967, was one of the earliest and most for reaching achievements in regard to women's status.⁴⁰ It called for recognition of equality for women in reality as well as in law, and broadened the concept of equality beyond the civil and political arena to include such rights as access to education, job opportunities and health care. The Declaration principles were subsequently included in a binding International Convention, known as the **"Convention on the Elimination of All Forms of Discrimination Against Women" (CEDAW)**, adopted by the U.N. General Assembly in 1979. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination.⁴¹

³⁸ Mishra Jyotsna, Op. Cit : p.p. 219-223.

³⁹ Agarwal, H.O, *Human Rights*, Allahabad : Central Law Publications, 2001, p.p. 39-43.

⁴⁰ Agarwal, Namita, *Supra*, at p.184.

⁴¹ Mishra Jyotsna, Op. Cit : at p.225.

According to the Convention, "discrimination against women" is a violation on the basis of sex of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field⁴². The article is based on the principle of equality between men and women.

By recognizing the Convention, independent nations of the world commit themselves to undertake a series of measures to end discrimination against women in all forms. The Convention provides the basis for realizing equality between men and women through ensuring women's equal access to opportunities in political and public life as well as in education and employment. The Convention affirms the reproductive rights of women, right to acquire, change or retain their nationality and the nationality of their children. The independent Nations of the world agree to take appropriate measures against all forms of traffic in women and exploitation of women. They also agree to take all appropriate measures including legislation so that women can enjoy all their human rights and temporary special measures and fundamental freedom.

Countries that have ratified or acceded to the Convention are legally bound to put into practice its provisions. They are also committed to submit national reports, at least once every four years, on measures they have taken to comply with their treaty obligations. Accordingly the Committee on the Status of Women in India was set up in 1971.

The Convention, which came into force on 3 September, 1981, has, as of 31 May 1996, been ratified by 152 U.N. member States including India⁴³.

⁴² Article : 1 - CEDAW (Source : Brochure - American Information Resource Centre, Mumbai)

⁴³ U.N. Dept. of Public Information : 1996 on CEDAW (Source : American Information Resources Centre, Mumbai)

Another landmark step in the direction of women's human rights has been the Declaration on the Elimination of Violence Against Women adopted by the U.N. in 1993.

2.6 Evolution of Women's Rights as female Human Rights:

Human Rights for women has been defined as the collective rights of a woman to be seen and accepted as a person with the capacity to decide or act on her own behalf and to have equal access to resources and equitable social, economic and political support to develop her full potential. It has been unanimously expressed that women's rights are human rights and that feminism cannot be delinked from human rights advocacy.⁴⁴ In the past, human rights advocate often tended to treat women's right separately from human rights. But such an attitude is rapidly changing. There are over twenty three (23) main U.N. Conventions relating Human Rights in general and five (5) specifically to women. The specifics are :

- 1) Convention on the Elimination of all Forms of Discrimination against women.
- 2) Convention on Political Rights of Women.
- 3) Convention on the consent of Marriage, Minimum Age of Marriage and Registration of Marriage.
- 4) Convention on the Nationality of Married women and
- 5) Convention on the Recovery abroad of Maintenance.

International Instruments and Mechanisms for Enforcement of women's Rights:

The adoption of the UN Charter – Provisions for equal rights of men and women.

⁴⁴ Agrawal Namita, *Women and Law in India*, Delhi : New Century Publications, 2002, p. 165.

- 1947 Formation of the Commission on the status of women.
- 1948 Universal Declaration of Human Rights.
- 1952(1954) Convention on Political Rights of women
- 1957(1958) Convention on the Nationality of Married women.
- 1962(1964) ~~Convention on consent of marriage, minimum age for~~
marriage and registration of marriage.
- 1966(1976) International Covenant on Civil and Political Rights.
- 1967 Declaration on the Elimination of discrimination against
women.
- 1979(1981) *Convention on the Elimination of All Forms of Discrimination*
against women.
- 1993 Declaration on violence against women.⁴⁵

The early seventies saw a significant change in bringing women's issues to the center stage. In 1972, the General Assembly designated 1975 as International Women's Year to focus on women's issues. Immediately in 1974, the UN called for a World Conference on Women to be held in 1975 in conjunction with the International Women's year Tribune and adopted the first World Plan of Action and proclaimed the first Decade for Women's Equality, Development and Peace (1976-1985).

During this decade, an important change in priorities took place in the international community's concern with women's status. It was the shift from its emphasis and efforts from small social projects to giving women a major legal place in the world. The Convention on the Elimination of All Forms of Discrimination against Women, adopted by the UN in 1979, reflected this change in thinking. The Convention is the most recent of global human rights documents and defines international norms for treatment of individuals and groups by their governments. It was emphasized that Women Rights are Human Rights and those who work

⁴⁵ Ibid. p. 167

for implementation of the Convention are part of the international women's rights community. With the Convention becoming widely accepted women's groups in developing countries are pushing for law and policy changes in conformity with Convention principles.

Adoption of the **Forward-Looking Strategies (FLS)** for the Advancement of Women in 1985 at the Third World Conference on Women at Nairobi, set out a blue print to advance the status of women and integrate women into broad based mainstream activities.⁴⁶ Building on the principle articulated in Mexico city, at the first UN Conference in 1975, the FLS identified obstacles and recommended specific steps to overcome them, strongly emphasising participation by women at all levels of decision making. **INSTRAW (UN International Research and Training Institute for the Advancement of Women)** and **UNIFEM (United Nations Development Fund for Women)** are remarkable achievements.⁴⁷

The years that followed saw a growing public awareness of the many serious economic and social problems that had previously been overshadowed by the political tensions of the cold war. In a series of conferences in the 1990s, beginning with the UN Conference on Environment and Development (UNCED), a new gender consciousness began to emerge and be articulated. Women were not only seen as the most adversely affected victims of social upheaval, but also the most potent agents for change. A global Consortium of activists and scholars called the International Women's Rights Action Watch (IWRAW) organised a seminar in 1989 in Vienna (Austria) in which about a hundred women from over forty countries participated to discuss their strategy to make women's issues central to the human rights agenda in preparation for the world conference on Human Rights to be held in Vienna in 1993.⁴⁸

⁴⁶ Mishra Jyotsna, Op. Cit. at p. 226.

⁴⁷ U.N. Department of Public Information (1985) Brochure Mumbai, AIRC

⁴⁸ Source : *Women and Human Rights*, New Delhi : Indian Institute of Human Rights (Resource material)

The women's movement made a petition as early as 1991 asking that the world conference should incorporate women into the agenda in two ways: one, in relation to all the other topics; and two, in relation to women's specific issues, like violence. The increase in violence against women and their invisibility make clear that the human rights mechanism were failing to address massive human rights violations. Statistics indicate that there are between 60-1000 million women missing in the world, primarily in Asia, and a large number in India. The human rights community has not yet addressed these kinds of disappearance, which often stem from gender discrimination, particularly in the context of poverty and lack of socio-economic rights and the right to development.

These efforts by women's organizations all over the world culminated in the UN World Conference on Human Rights at Vienna held in June 1993. Here an international tribunal on the violation of women's human rights was organized and these rights were specifically integrated into all aspects of the UN human rights agenda and activities.⁴⁹

The International Conference on Population and Development (Cairo, 1994) took the process a step further. For the first time gender equities and the empowerment of women through education, health, and nutrition were linked to traditional population issues such as family planning, as essential to the achievements of sustainable development. The Government of India has framed a national policy for empowerment of women in the year 2001.⁵⁰

Women's issues are thus fully integrated into the world's most important economic and social concerns, at least in theory, and efforts are on to translate them into reality. The Fourth World Conference on Women,

⁴⁹ Human Rights Tribune on Women's Right as Human Rights 1993

⁵⁰ Kumar Meena, *Women's Health and Empowerment*, New Delhi : Deep and Deep Publication, 2002, p.1

incorporated the issue of Women's Human Rights as one of the critical areas of concern in its Platform for Action.

2.7 International Women's Conferences:

The International Women's Conference, 1975, was organised to coincide with the International Women's Year. The International Women's Conference had delegations from 133 member states of the U.N. apart from the state delegations who met in the conference; 6,000 NGO representatives were also involved in a parallel gathering called the International Women's Year Tribune.

In the conference, the delegates drew out a World Plan of Action for a decade 1975-1985 with a comprehensive set of guidelines for the advancement of women. The overall objective was threefold-to promote equality between men and women, to ensure the integration of women in the total development efforts, and to increase the contribution of women to the strengthening of world peace.⁵¹

The conference recommended that the U.N. declare 1976-85 as the international decade for women. The conference at its close, adopted a World Plan of Action; on the equality of women and their contribution to development and peace. This is known as Mexico Declaration.

The Copenhagen International Conference on Women, 1980 met to update the Mexico Plan of Action and review the progress in implementing the Mexico resolutions. Besides, the conference themes pointed three areas of urgent concern for women: employment, health and education.

⁵¹ U.N. Department of Information Mumbai AIRC, 1990.

The conference in a critical appraisal of the outcome of the Mexico conference cited the lack of political will to improve women's status in many countries, lack of attention to the particular needs of women, and too few women in decision making positions.

The World Survey on the Role of Women in Development helped to understand the women's condition, globally. It showed that only a minority of women had benefited from the programme thus far. This review laid the groundwork for the Third World Conference on Women in Nairobi, 1985.⁵²

At the heart of the strategies lay recognition of equality at the national level for implementing the various programmes. The document declared that as the various nations are at different levels of development, they should have the option to set their own priorities in accordance with their own development policies.

The Beijing Conference, 1995 held in the fiftieth anniversary of U.N., was the largest ever gathering held of government and NGO representatives. The Beijing Declaration and Platform for Action adopted unanimously by 189 countries, built on political agreements reached at the previous three conferences on women to establish 12 priority areas for action by the international community over the next five years.

At this juncture the Vienna Conference of 1993 and Beijing Conference of 1995 require special mention.⁵³

⁵² *Report of World Conference on Women, 1995*, U.N. Department Information.

⁵³ *U.N. Human Development Report, 1998*, U.N. Department of Information.

2.8 Vienna Conference on Human Rights and Violence Against Women:

The Human history bears witness to occurrences of violence against women on account of sex discrimination. Women are equally entitled to human rights. Violence against women is a subject which concerns the world over.⁵⁴ Although violence against women is a global problem, it is yet to be recognized as an issue of human rights.⁵⁵

On 25 June 1993, representatives of 171 states adopted by consensus the Vienna Declaration and Programme of Action of the World Conference on Human Rights. It recognised that the human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels and the eradication of all forms of discrimination on ground of sex are priority objectives of the international community. It further states that gender based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated. It emphasizes that the human rights of women should form an integral part of the United Nations human rights activities, including the promotion of all human rights instruments relating to women.

The Conference urged government, institutions, inter governmental and non-government organizations to intensify their efforts for the protection and promotion of human rights of women and the girl child⁵⁶.

⁵⁴ Shah and Gupta, Op. Cited. p. 127

⁵⁵ Mishra Jyotsna, *Women and Human Rights*, New Delhi: Kalpaz Publications, 2002, p. 102.

⁵⁶ U.N. Dept. of Public Information – 1995 on Vienna Declaration and Programme for action.

It took an important step to promote and protect the rights of women by supporting the creation of a new mechanism, a Special Reporter on violence against women. The commitment was acted upon quickly. At its next session, the UN Commission on Human Rights appointed a Special Reporter on violence against women. The Declaration on the Elimination of Violence Against Women was adopted by the UN in the same year (1993).

According to the Declaration on the Elimination of Violence Against Women, violence means any act of gender based violence that results in or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life⁵⁷. The Declaration consists of six articles and is designed to strengthen and complement the process of elimination of all forms of discrimination against women.

By now it has been accepted that violence against women is a pervasive human rights problem and not merely a private matter as most government have regarded it till so far⁵⁸.

2.9 Beijing Conference on Women and the Human Rights:

The Fourth world Conference on Women held in Beijing in September 1995 was an important step forward on the issue of protecting and promoting human rights of women as an integral part of universal human rights. The Conference adopted the Beijing Declaration and Platform for Action, which was a call for concrete action to make a difference. Human Rights were one of the ten critical areas identified by the Platform for Action. It marked the action to be taken by governments to promote and protect the human rights of women through the full

⁵⁷ Art. 1 : Declaration on Elimination of Violence Against Women.

implementation of all human rights instruments, especially the CEDAW. It emphasised the need to promote an active and visible policy of mainstreaming a gender perspective in all policies and programmes of governments in addressing the enjoyment of human rights. All forms of violence against women were clearly recognised as human rights violations, incompatible with the dignity and the worth of a human person. Governments were urged to take steps to combat and eliminate all forms of violence against women in private and public life, whether perpetrated or tolerated by the state or by private persons. Here governments declared that violence against women constitute a violence of basic human rights and is an obstacle to the achievement of the objectives of equality, development, and peace⁵⁹.

The message of Hillary Clinton (wife of then American President Bill Clinton) at the conference is self-explanatory, "It is time for us to say here in Beijing and for the world to hear, that is no longer acceptable to discuss women's rights as separate from human rights. If there is one message that echoes from this Conference, it is that human rights are women's right and women's rights are human rights"⁶⁰.

2.10 U.N. Commission on Status of Women:

The creation of the Commission on the Status of Women was the first step towards reorienting the political discourse to highlight the women's question that the U.N. initiated. The Commission was particularly instrumental in collecting data documenting the situation of women in many parts of the world.

The Commission helped draft the Universal Declaration of Human Rights (UDHR) comprising the International Bill of Human Rights and the

⁵⁸ U.N. Dept. of Public Information : *Human Rights, Women & Violence*, 1996.

⁵⁹ U.N. Dept. of Public Information : *Human Rights, Women & Violence*, 1996.

⁶⁰ U.S. Information Service : 1995

International Covenant on Economic, Social and Cultural Rights. In the process, the Commission could influence the language of the draft to ensure the “explicit equality” of women in legal terms.

The General Assembly also requested the Commission on the Status of Women in December 1963 to start working on the draft, for the elimination of all forms of discrimination against women. The Declaration of the Elimination of All Forms of Discrimination Against Women (DEDAW) 1969, later became a convention. The DEDAW in 1979, helped secure a legal foundation for woman’s equality. The convention gave the call for drafting new laws to end discrimination against women, endorsed old laws, customs and regulations.⁶¹

In 1972, the year marking the 25th year of the formation of the Commission on the Status of Women, the Commission recommended to the General Assembly that the year 1975 be designated as the International Women’s Year.

The International Women’s Year was observed with particular importance attached to **three themes** that were recommended by the Commission. *These themes were the equality of women in political and legal terminology, appraisal of the contribution of women to the process of development and their increasing contribution to the strengthening of world peace.*

2.11 The SAARC on Gender Justice and Female Human Rights:

The global debates on gender increasingly came to the conclusion that women at large were at a disadvantaged position. While realising this, the various conferences also realised the need for attending to the

⁶¹ U.N. Department of Information – Brochure, 1985

particular problems concerning women's issues emerging out of socio-cultural as well as economic backgrounds.

In the SAARC countries the major initiative in attention towards women's problems was through its declaration of the SAARC decade of the GIRL Child 1991-2000 A.D.

The consensual aims of the plan of action drafted and approved accordingly include: i) survival and protection of the girl child and safe motherhood, especially aimed at making her economically independent and ii) special protection for vulnerable girl children in difficult circumstances and specially those belonging to economically and socially deprived, or physically, mentally disabled groups.⁶²

As contrasted with the global debate, the debate amongst SAARC countries focuses on comprehensive growth and development of the girl child. This apart, themes like prevention of female infanticide and female foeticide have high priority in both the global and the regional agendas.

Other than the social themes that engage attention on the growth of girl child in society, developmental themes are also dominant, which show the plans to reduce infant mortality rate and elimination of severe and moderate malnutrition. The SAARC plan is also sensitive to the educational needs of the girl child. This is reflected in the plans to reduce the illiteracy rate in these countries, with special reference to women in the age group of 15-20 years. These include programmes for offering vocational courses and in inculcating a scientific temper.

At the regional level, the countries have shown sensitivity to attend to themes that are specific to the country or society involved. Thus, the Government of India paid special attention to girls from socially

⁶² National Commission for Women – Brochure, 1998

disadvantaged sections like the scheduled castes and tribes. The children with AIDS or parents affected by AIDS also figure in the picture, apart from the physically or mentally disabled.

The SAARC convention also set up a research cell to look into the various complexities and give a situational analysis of the "Girl Child and the Family", as part of the SAARC Year of Girl Child.⁶³

2.12 WOMEN AND HUMAN RIGHTS IN INDIA:

Article 51 A(e) of the Constitution of India solemnly enjoy each one of us "to renounce practices derogatory to the dignity of women". And above all the collective conscience of the world as reflected in Article 25 (2) of the Universal Declaration of Human Rights, which we are honour bound to uphold and foster lays down :

"Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same protection".

Inspite of all these, in this sacred land of Sita, Savitri and Damayanti,⁶⁴ we find that women are being seduced, enjoyed and then betrayed in the name of love (Venugopal V.T. Pankajam⁶⁵ 1961 (I) Cr. LJ 804 AP or bogus marriage (Gopal Chauhan V Satya 1979 Cr. LJ 446 (H.P.))⁶⁶ or raped and tortured in Public custody Arjan Ram V State⁶⁷ 1960 Cr. LJ 849 (Punj) Sarju Singh V State⁶⁸ 1978 Cr. LJ 286 or being burnt for extorting

⁶³ National Commission for Women – Brochure, 2001

⁶⁴ Deb. R, *Criminal Justice*, Allahabad :The Law Book Co. (P) Ltd., 1998, p.p. 259-260.

⁶⁵ -do-

⁶⁶ -do-

⁶⁷ -do-

⁶⁸ -do-

dowry. *Nirmala Devi V State* 1983⁶⁹ Cr. L.J. 230 (Punj) *Jaspal Singh V State*⁷⁰ 1984 Cr. LJ 69 (Punj).

The Constitution of India is committed to the protection of human rights in general and female human rights in particular.

An important mechanism of implementation of human rights at the national level in India has been the constitutional measures adopted in 1950. The Constitution aims to secure for all its citizens social, economic and political justice, liberty of faith and expression, equality of status and opportunity and to promote fraternity that assures the dignity of the individual and the unity of the nation. The various Conventions and Covenants related to this declaration of human rights find expression in the fundamental rights enshrined in the Constitution, which are enforceable in a law court, and in the Directive Principles of State Policy, which enunciate the guiding principle of action for the state. J. Bhagwati in *Maneka Gandhi V. Union of India*⁷¹ said, The fundamental rights weave a pattern of guarantee on the basic structure of human rights and impose negative obligations on the State not to encroach on individual liberty in its various dimensions.

Women in India have been granted parity with men in all fields. The state cannot discriminate against any citizen (Article 15(2)) on grounds only of religion, race, caste, sex, place of birth or any of them. However, nothing in this article would prevent the state from making any special provision for **women and children** (Article 15(3)). The following judicial decisions makes it clear :

⁶⁹ Deb. R. *Criminal Justice*, Allahabad :The Law Book Co. (P) Ltd., 1998, p.p. 259-260.

⁷⁰ -do-

⁷¹ AIR 1978 SC 597

- 1) In *Lakshmikant V. Union of India*⁷²

It was held that the welfare of children and women is the prime importance in a welfare state.

- 2) In *Government of A.P.V.P.B. & Vijay Kumar*⁷³

The Supreme Court explaining the object for inserting clause (3) to Article 15 observed that its object is to strengthen and improve the status of women.

- 3) In *Union of India V. V.P. Prabhakaran*⁷⁴

Preservation of certain posts exclusively for women is valid under article 15 (3)

Clause (3) of article 15, which permits special provision for women and children has been widely resorted to and the courts have upheld the validity of special measures in legislation or executive orders favouring women.⁷⁵

Article 15 (3) does not confer any right much less a fundamental right on women and children, but merely confer a discretionary power on the State to make special provisions for them.⁷⁶

Sex cannot be a ground of inequality or discrimination in relation to employment or appointment to any office under the state.⁷⁷ The state makes a provision to lay down certain principles of policy for women's welfare (Article 39) and the duty to provide for maternity relief and human conditions of work.

⁷² AIR 1984 SC 469

⁷³ AIR 1995 SC 1648

⁷⁴ (1997) 11 SCC 638

⁷⁵ Bakshi P.M, *The constitution of India*, Universal Law Publishing Company Pvt. Ltd. 2001, p. 27.

⁷⁶ Seervai H.M. *Constitutional Law of India*, New Delhi : Vol. I, Universal Book Traders, 1999, p. 556.

⁷⁷ Basu D.D, *Constitutional Law of India*, New Delhi : Prentice Hall of India Private Ltd. 7th edition, 1998, p. 33.

4) In Ramachandra V. State of Bihar ⁷⁸

It was held that clause (3) enable the State to confer special rights upon women (while clause clause (1) and (2) of Article 15 prohibit discrimination on the ground of sex)

5) Anjali Roy V State of West Bengal⁷⁹

It was held that the word 'for' in clause (3) signifies that special provisions can be made in favour of women and not against them.

6) Revathi V. Union of India⁸⁰

Sowmithi Vishnu V. Union of India⁸¹

Dattatraya V. State of Bombay⁸²

It was held that clause (1) to (3) of Article 15, read together would imply that State can discriminate in favour of women against men but cannot discriminate in favour of men against women.

In Madhu Kishwar V. State of Bihar⁸³ it was held that all forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights.

In India, thus, human rights mean the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution of India that are also provided in the Universal Declaration of Human Rights (UDHR). For example, the right to vote and be elected (Articles 325 and 326; UDHR, Article 21), right to work (Article 14, UDHR, Article 23 (1)), right to secure just and human conditions of work (Article 42, UDHR 23(1) and 21 (6)). Though with some reservations, India became party to the International Covenant on Economic, Social and Cultural Rights as well as to the Covenant on Civil and Political Rights in 1979.

⁷⁸ AIR 1966 Patna 214

⁷⁹ AIR 1952 Cal 825

⁸⁰ AIR 1998 SC 835

⁸¹ AIR 1985 SC 1618

⁸² AIR 1953 Bom 211

⁸³ (1996) SSCC 125

India has also become party to the Convention on the Elimination of All Forms of Discrimination Against Women, as well as the Convention on the Rights of the Child (CRC) in 1993. These initiatives on India's part show its commitment to the cause of Human rights as well as those related to women. This concern is further strengthened by the Protection of Human Rights Act of 1993 that provided for the constitution of National Human Rights Commission, which came into being in October 1993.

By virtue of the Protection of Human rights Act the principles embodied in CEDAW and the concomitant right to development became integral parts of the Indian Constitution and the Human Right Act became enforceable.⁸⁴

The women's movement in India today, though not a single cohesive movement, draws its strength from different forms of struggles all over the country and from its effort to influence programmes, policies and acts that lack gender perspective.

Though women began to organize themselves at the end of the last century, they became active during the freedom struggle, much the credit for which goes to Mahatma Gandhi. It was because of him that a large number of women came out in public from the traditional boundary of their households. The most recent phase of the women's movement began in the 1970s with the submission of the report of the Committee on the Status of Women in India (CSWI) in 1974. Various women's groups, NGOs, women's wings of political parties, women's cell and centers at the universities came up. They took up several issues, of rape and dowry in particular, discussed and lobbied for amendment in the

⁸⁴ Shukla V.N, *Constitution of India*, Lucknow : Eastern Book Company Supplement, 2000, p. XXXI(75)

related laws. For example, the Anti Dowry Campaign in Delhi in the seventies was an important event, the experience of which revealed the need for legal aid counselling and advice to women. It was in response to this that legal aid and counselling centers were set up in different parts of the country and led women in India to take up in a more concerted manner the implementation of rights granted to them by the Constitution and other legislations.

The last few years have seen the broadening and expansion of the movement to take a whole range of issues. The women's movement has been able to influence the approach and method of the development, which has moved from being welfaristic to empowerment oriented. Its success is most evident in the constitution of the National Commission for Women on 31st July 1992, a high-powered autonomous body. Subsequently, various Women's State Commissions have been either formed, or are in the process of being formed. Another very important achievement of the women's movement in India has been the passage of the 73rd and 74th Constitutional Amendment Acts, 1992 added Article 243D and 243T to the Constitution reserving one-third seats for women in the elected panchayats and urban local bodies. These Acts became operational on April 24, 1993. Today, several states have successfully conducted elections and 33 per cent or more women are present in these local bodies at all the levels. Of no less significance was the event of India joining the world nations in ratifying the women's human rights treaty (CEDAW) in 1993.

The proposed constitution (84th Amendment) Bill 1998 contains provisions for the reservation of 33 percent of seats for women in the composition of the Lok Sabha and the Legislative Assemblies of the States. The object of these provisions is to raise the political status of our women folk and the removal of imbalances in the participation of

men and women in political life. These provisions would be protected under Article 15 (3).⁸⁵

The fact that the issue of women's human rights was one of the critical areas of concern in the Beijing Conference (1995) for women not only across the world, but also in India is clear from the words expressed in the Country Report of the Government of India presented at the Conference. It say, " History shows that although the struggle for women's rights as human is long and hard, it is a struggle that must be waged and won".⁸⁶ However, the major barrier to the realization of women's human rights is the lack of enforcement machinery.⁸⁷

2.13 Women's Rights as Female Human Rights in India:

Women's rights are human rights and violation of women's rights is the violation of human rights. This is a slogan and a belief, which reflects the unity of women in terms of their situation around the world, India being no exception to it. This idea focuses on two things. One that in discussion of all issues from poverty to development and from health and education to empowerment and peace, reference to women is necessary. All such discussions must have a gender perspective as they affect both men and women, though women are affected much more severely. Two, that there are specific gender issues, like violence against women that require specific attention of one and all and need to be given a space. In India, women are disadvantaged, suffering both from obsolete traditional norms of patriarchal society, as well as from the forces unleashed in the course of the process of development. Though in several aspects like health and education and employment women's position has improved,

⁸⁵ Kumar N. *Constitutional Law of India*, Pioneer Publications, 2003, p. 177.

⁸⁶ *IV World Conference on Women*, Beijing, 1995, Country Report Government of India, p.p.128-130.

⁸⁷ Bhaskar B.R.P. *Human Right*, Vigil India Movement, Bangalore, 2001, p. 56.

compared to men they are far behind. This can be seen by focusing on certain indicators of development and empowerment.

According to Prof. Ramesh Chandra, prominent academician and Vice Chancellor of Bundelkhand University, Jhansi, the National Policy for Education made a strong commitment to a 'well conceived edge in favour of women' as 'an act of faith and social engineering'. These commitments have been translated into concrete guidelines and have resulted in a number of interventions which focus on the empowerment of women as the critical pre-condition for their participation in the educational process.⁸⁸

The sex ratio, females per thousand males is 927 in 1991 and 945 in 2001, which is constantly declining over the decades, is a matter of grave concern. Life expectancy at birth has improved in the last few years which now stands at 60.7 years for females and 60.6 years for males. The infant mortality rate at 81 per thousand live birth and maternal mortality rate of 570 per one lakh live birth are still high which shows negligence of child care and women's reproductive health problems that are intensified due to lack of better medical facilities. It was noted that 88 per cent of pregnant women aged 15-49 were anemic. There is still a huge gap between female and male literacy rates that are 39.29 and 64.3 per cent respectively. Though school enrollment ratios have been rising, high dropout rate particularly for girls still continues to be a major problem. Kofi Annan, Secretary General of UN in a message on September 8, 2000 first International Literacy Day said, There are 800 million adult illiterates in the world today. Two thirds of them are women out of more than 110 million children who are deprived of basic education, two thirds are girls. As we mark the first International Literacy Day of the millennium, let us recognize that the right to literacy

⁸⁸ Chandra Ramesh, *Encyclopaedia of Education in South Asia, Vol. III*, Delhi : Kalpaz Publications, 2003, p. 26.

is universal.⁸⁹ Only about 32 percent of girls entering the primary stage reach the end of schooling. There has only been a steady rise in work participation of females to 22.27 percent (1991) against males 51.61 percent, while most of them that are 85.9 percent are still in the unorganised sector. Women's representation in various decision-making bodies is still negligible. In the Lok Sabha it has never gone beyond 8 percent and it has varied between 3 and 6 percent in different legislative assemblies. The following Table will show the position of women representation in Lok Sabha since 1952.⁹⁰

Women candidates in LS 1952-99

Year	No. of Women	Seats
1952	22	499
1957	27	500
1962	34	503
1967	31	523
1971	22	521
1977	19	544
1980	28	544
1984	44	544
1989	27	517
1991	39	544
1996	40	547
1998	43	543
1999	48	543
2004	44	543

Average percentage of seats in all Loksabhas (5.83%)

Source : Times o India May 23, 2004.

⁸⁹ Bhaskar B.R.P, Op. Cited. p. 75

⁹⁰ Times of India May 23, 2004 (Bombay)

There are only about 2.5 percent women as administrators and managers and 20.5 percent as professionals and technical workers⁹¹. Not only are women's human rights to basic facilities and decision-making powers limited, they are also targets of violence. Incidents of dowry deaths and other forms of domestic violence have increased over the last few years despite the amendments in dowry and rape laws.⁹² Sexual harassment, within the family, society and the workplace continue unabated. Violence and its perpetuation are often related to conflicts of caste, class, ethnicity, communalism, fundamentalism and terrorism, which cumulatively have a negative impact on women. Other forms of violence are trafficking in women and girls and custodial violence perpetuated by law enforcing agencies. In September 2000 the U.N. Population Fund (UNFPA) reported that across the world one in three women had been physically assaulted or abused in some way, typically by someone she knew, such as her husband or another male member of her family.⁹³ There are other more latent and unquantifiable aspects of aggression namely emotional violence and other forms of cruelty-foeticide, infanticide denial of food to females.⁹⁴ Gender discrimination is so stark that in Tamil Nadu the Nutrious Noon Meal Scheme (1982-92) was only for boys and not for girls.⁹⁵

The fact that the Country Report presented at the women's conference (Beijing 1995) contains a full chapter on countering that **threat of violence against women** shows increasing significance of the subject, when thirty years ago, in the Report of the Committee on the Status of Women in India (1974) there was no chapter on violence. The recently constituted National Human Rights Commission (1993) takes steps to resolve the cases of the violation of human rights, including the rights of

⁹¹ Human Development Report, 1998

⁹² Agnes, Flavia, *Women and Law in India*, Delhi : Oxford University Press, 2004, p. 222

⁹³ *Human Rights Watch – World Report*, New York, Washington, London, Womens' human rights, 2001, p.445.

⁹⁴ Report : *IV World Conference on Women, 1995*, Country Report, Govt. of India

⁹⁵ Chandra Ramesh, *Social Development in India; Vol.V*: Isha Book, 2004, p.1.

women. It is the National Commission for Women (1992) that takes up specifically the case of violation of women's rights and deprivation, and works towards their welfare and development. They have taken up the cases of sexual harassment, atrocities on women, for example in Uttaranchal, dowry death cases, harassment at work place and overall gender based denial of opportunities.⁹⁶ Prof. Ramesh Chandra cites an eloquent example of discrimination of women in Tourism Industry; wherein the women are denied positions of leadership and responsibility.⁹⁷

Within women also there is inequality example between Dalit women and non-dalit women. (The term Dalit is used here for all scheduled caste and scheduled tribe women).⁹⁸

According to Dr. Amartya Kumarsen, women face seven types of inequality :

- i) Morality, inequality i.e. gender bias in health care and nutrition.
- ii) Natality, inequality means sex selective abortion and female infanticide
- iii) Inequality in education
- iv) Opportunity inequality
- v) Professional inequality
- vi) Opportunity inequality
- vii) Ownership inequality and
- viii) Household inequality.⁹⁹

Though a lot needs to be done, the efforts on the part of the Government and non-government organizations and women's groups prove that women concerns have become central to all other issues and more

⁹⁶ The National Commission for Women – Brochure, 1998.

⁹⁷ Chandra Ramesh, Op. Cit. Vol. VI, p. 58.

⁹⁸ Pawan, Sanjay and Jaideva, *Encyclopaedia of Dalits in India*, Vol. 9, Women, Delhi : Kalpaz Publications. 2002, p. 81.

⁹⁹ Patel, Vibhuti, *Womens challenges of the New Millennium*, Delhi : Gyan Publishing House, 2002, p.1.

attention is given to the gender specific issues nowadays. It has been recognized that women's rights are human rights and their violation is the violation of human rights. India is committed to this issue.

2.14 Female Human Rights and Indian Judiciary:

The higher judiciary has shown concern for women's human rights. Even after the establishment of Human Rights Commission the higher judiciary has continued its creative role in ensuring the human rights of the ordinary man.¹⁰⁰ The Supreme Court has also been greatly influenced by the International declarations and conventions on human rights. In *Bodhi Sattwa v. Ms. Subra Chakraborty*,¹⁰¹ the Apex Court has termed rape as a crime against basic human rights. The impact of ILO Manila Seminar held in 1993 did have impregnable impact on judicial thinking and in *Vishakha v. State of Rajasthan*.¹⁰² The Supreme Court in this epoch making judgment took a serious note of the increasing menace of sexual harassment at work place and elsewhere. Considering the inadequacy of legislation on the point, the court even assumed the role of legislature and defined "sexual harassment" and laid down instructions for the employers. In *Apparel Export Promotion Council v. A.K. Chopra*,¹⁰³ the Court found all facets of gender equality including prevention of sexual harassment in the fundamental rights guaranteed by our Constitution. The Court looked into international documents – Convention on Elimination of All forms of Discrimination Against Women (CEDAW), Beijing Declaration, 1995 and Covenant on Economic, Social and Cultural Rights and made the following observation:

¹⁰⁰ Sunny K.C, *The Judiciary Trend Setting decisions, Human Rights* edited by Bhaskar, Bangalore :Pub: Vigil India Movement, 2001, p. 75.

¹⁰¹ AIR 1996 SC 922

¹⁰² AIR 1997 SC 3011

¹⁰³ AIR 1999 SC 625

“These international instruments cast an obligation on the Indian States to gender sensitize its laws and the Courts are under an obligation to see that the message of the international instruments is not allowed to be drowned. This Court has in numerous cases emphasis that while discussing constitutional requirements, court and counsel must never forget the core principle embodied in the International Conventions and Instruments and as far as possible give effect to the principles contained in those international instruments. The Courts are under an obligation to give due regard to International Conventions and norms for construing domestic laws more so when there is no inconsistency between them and there is a void in domestic law”.

Leaning heavily on Universal Declaration of Human Rights, Convention on the Elimination of All Forms of Discrimination Against Women,¹⁰⁴ and the Beijing Declaration on Status of Women, the Supreme Court in *Githa Hariharan V. Reserve Bank of India*,¹⁰⁵ interpreted S. 6(a) of the Hindu Minority and Guardianship Act, 1956 and S.19(b) of the Guardians and Wards Act, 1890 in such a way that father and mother get equal status as guardians of a minor. In *Chairman, Railway Board v. Chandrima Das*,¹⁰⁶ the Apex Court awarded compensation of ten lacs to an alien women under Art. 21 of the Constitution, who had been a victim of rape. The Court also relied upon international human rights instruments and observed:

“The International Covenants and Declarations as adopted by the United Nations have to be respected by all signatory States..... The applicability of the Universal Declaration of Human Rights and principles thereof may have to be read, if need be, into the domestic jurisprudence:

¹⁰⁴ AIR 1999 SC 1149 at p. 1155 per Umesh C. Banerjee, J

¹⁰⁵ Ibid. AIR 1999 SC 1149 at p. 1154 per Dr. A.S. Anand, C.J.I

¹⁰⁶ AIR 2000 SC 988

In *Ningamma V. Chikkaiah*¹⁰⁷ and in *Sheela Barse V. State of Maharashtra*¹⁰⁸ the Supreme Court dealt with two specific issues of human rights viz. Compulsory medical test and custodial death.

In *Municipal Corporation of Delhi v. Female Workers (Muster Roll)*¹⁰⁹, the Supreme Court extended the benefits of the Maternity Benefit Act, 1961 to the muster roll (daily wagers) female employees of Delhi Municipal Corporation. In this case, the Court directly incorporated the provisions of Art.11 of the CDAW, 1979 into Indian law.¹¹⁰

In this way in the above-mentioned recent decisions, the Indian judiciary has been greatly influenced by international human rights conventions and declarations in extending the horizons of equality to the Indian women including aliens.

The noted jurist Dr. N.R. Madhava Menon says that, trafficking in women and children, violence against weaker sections, discriminatory indicators of human development are all pointing to situation in which the world's largest democracy, despite having a free press and an independent judiciary is grossly insufficient to deliver the constitutional promise of justice and equality among its citizens.¹¹¹

2.15 FEMALE HUMAN RIGHTS AND LAWS IN INDIA:

In India Articles 14, 15 and 16 of the Constitution of India, which are the fundamental rights of the citizens in general, also act as the foundation of the guarantee that the women in India cannot be treated inferior to their counterparts in any sphere of life. The relevant constitutional guarantees are extracted below:

¹⁰⁷ AIR 2000 Kar 51.

¹⁰⁸ (1993) 2 SCC 96

¹⁰⁹ AIR 2000 SC 1274

¹¹⁰ Ibid at p.1283

¹¹¹ Bhaskar, B.P.R, Op. Cit. p. 12

Article 14 :

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 15:

- (1) The State shall not discriminate against any citizen on grounds only of religion race, caste, sex, place of birth or any of them.
- (2) Xxxx xxxxx
- (3) Nothing in this article shall prevent the State from making any special provision for women and children.
- (4) Xxxxxx xxxx

Article 16:

- (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
- (2) No citizen shall on grounds only of religion, race, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminate against in respect of any employment or office under the State.
- (3) to (5) xxx xxxxx

Article 39:

The State shall, in particular, direct its policy towards securing-

- (a) that the citizens, men and women equality, have the right to an adequate means to livelihood:
- (b) xxxx xxxx
- (c) xxxx xxxx
- (d) that there is equal pay for equal work for both men and women:
- (e) xxxx xxxx
- (f) xxxx xxxx

In this way Indian Constitution offers wholesome guarantee of equality to its women citizens. Articles 14, 15 and 16 embrace only equality,

uniformity and protection and excludes all sort of discrimination in the ordinary life of men and women. Amongst the Constitutional provisions Article 15(3) can be said to be the source of giving substantive equality by way of enactment of different statutes and laws.

Now, it would be interesting to peep into the relevant laws, which take care of guarantee of equality to the women by way of their protection in the male dominated Indian society. It is difficult to give an exhaustive list of such provisions in this chapter. However the following chart would give some idea about the place of women in Indian laws and also about their protection in day to day life:-

2.15.1 Constitutional Equality:

Article 14 :

Equality before law – The State shall not deny to any person equality before the law or the equal protection of the laws.

Article 15:

Prohibition and discrimination on the ground of religion, race, caste, sex and place of birth.

Article 15 (3):

Nothing in this Article shall prevent the State for making any special provision for women and children.

Article 16:

Equality of opportunity in matter of public employment.

Article 16(4):

Special provisions can be made for the reservation of appointments or posts in view of any backward class of citizen who are not adequately represented in the service under the State.

2.15.2 Directives Principles:

The Directive Principles of State Policy contained in Part IV of the Constitution incorporate many directives to the State to improve the status of women and for their protection.

Article 39(a) directs the State to direct its policy towards securing that the citizen, men and women, equally have the right to an adequate means of livelihood.

Article 39(d) directs the State to secure equal pay for equal work for both men and women. The State has enacted The Equal Remuneration Act, 1979 to give effect to this Directive Principle.

Article 39(e) specifically directs the State not to abuse the health and strength of workers, men and women.

Article 42 of the Constitution incorporates a very important provision for the benefit of women. It directs the State to make provisions for securing just and humane conditions of work and for maternity relief. The State has tried to implement this directive by enacting The Maternity Benefit Act, 1961.

Article 44 directs the State to secure for the citizens a uniform civil code through out the territory of India. This particular goal is towards the achievement of gender justice.

Fundamental Duties

Article 51-A prohibits practices derogatory to the dignity of women.

Reservation

Article 243D and 243T provides for reservation of seats in Panchayats and Municipalities.

In keeping pace with the constitution the State has passed a large number of laws in every possible sphere of women. Touching the Labour Laws, Criminal Laws, Family Laws and other Civil Laws.

The Labour Laws are as follows :

- a) Maternity Benefit Act 1961.
- b) Equal Remuneration Act 1976.
- c) The Child Labour (Prohibition and Regulation) Act 1986.
Although some laws are not specific, they also concern women.
They are :
 - d) The Workmen's Compensation Act 1923.
 - e) The Minimum Wages Act 1948.
 - f) The Contract Labour (Regulation and Abolition) Act 1970.
 - g) The Bonded Labour System (Abolition) Act 1976.
 - h) The Inter-State Migrant Workers Act, 1979.
 - i) The Factories Act, 1948.
 - j) The Employees State Insurance Act, 1948.
 - k) Plantation Labour Act, 1951.

2.15.3 Formal equality:

1. Code of Criminal Procedure:

Section 125 : Right to get maintenance allowance.

2. Indian Penal Code:

Sections 292, 293 : Punishment for sale and exhibition of
and 294 obscene books and objects and for
obscene acts in public place.

Section 304 B : Murder of women in connection with
demand of dowry.

Sections 312, 313, : Punishment for causing miscarriage,
314, 315, 316, 317 injuries to unborn children and disposal
and 318 of newborn baby.

Section 354 : Offence for outraging the modesty of any
woman.

Section 366 : Kidnapping a woman for marriage
against her will and / or to seduce the
woman to illicit intercourse.

Section 366 A : Procurement of minor girl for sexual
purpose.

Section 366 B : Import of girls for illicit intercourse.

Section 372/373 : Selling and buying of minors for the
purpose of prostitution.

Section 376 : Punishment for rape.

- Section 493/494 : Protection of women from deceitful cohabitation and marriage.
- Section 497 : Protection of married women from adultery.
- Section 498 : Enticing or taking away a married women with criminal intent.
- Section 498 A : Subjecting a woman to cruelty by her husband or relatives of husband.
- Section 509 : Punishment for uttering words and gesture or act intended to insult the modesty of woman.

3. The Indian Evidence Act:

- Section 113 A : Presumption as to abutment of suicide by a married woman within 7 years of marriage.
- Section 113 B : Presumption as to dowry death of a women.
- Section 114 A : Presumption as to absence of consent of woman for sexual intercourse.

4. Hindu Adoptions and Maintenance Act:

- Section 18(1) : Obligation of husband to maintain his wife and as such a protection to a woman from becoming destitute.
- Section 18(2) : Right of wife to live separately without forfeiture her claim to maintenance.
- Section 19 : Maintenance of widow by her father-in-law.

5. Hindu Successions Act, 1956:

- Section 6 : Devolution of interests in coparcenery property both male and female legal heirs have the same rights.
- Section 10 : Widow is entitled to one share, wife, mother and daughter are equality treated as class (1) legal heir amongst others.
- Section 14 : Property of female Hindu to be her absolute property.
- Section 23 : Right of female legal heirs in the dwelling houses.

6. Hindu Minority and Guardianship Act, 1956:

Section 6 : Mother is a natural guardian of a minor below 5 years of age ordinarily. Only thereafter preference has been given to the father.

Section 7 : Father is a natural guardian of adopted minor son, followed by the adoptive mother.

7. The Hindu Marriage Act, 1955:

Sections 10 and 13 : Judicial separation not divorce – Both the husband and the wife have been given the same rights to get such a decree.

Section 13(2) : A wife may also present a petition for dissolution of marriage on the ground of polygamy; if the husband is guilty of rape and sodomy and also on the ground on on-cohabitation after a maintenance order.

Section 13 B : Divorce by mutual consent:

Equal right has been conferred to the wife.

- Section 14 : Restriction for filing petition for divorce within one year of marriage.
- Section 22 : Family dispute proceedings to be held in camera.
- Section 24 : Relief for maintenance, pendente-lite and expenses of the proceeding.
- Section 25 : Right provided to a wife to seek permanent alimony and maintenance.
- Section 26 : Right to claim custody of children.
- Section 27 : Order regarding joint property of business and wife.

8. Dowry Prohibition Act, 1961:

Demand of dowry either before the marriage, during marriage and or after the marriage is an offence.

9. Muslim Women (Protection of Rights on Divorce) Act, 1986:

- Section 3 : Rights over deferred dower/Mehr and other properties given to her at the time of her marriage and also for maintenance allowance during iddat period.

Section 4 : Provisions for maintenance of the divorce
by the relatives after the iddat period.

In recent years, the empowerment of women has been recognized as the central issue in determining the status of women. The Government of India has framed a 'National Policy for the empowerment of women' and its enthusiasm to raise the status of women, the year 2001 has been declared as the women's empowerment year. While several programmes for the benefit of women have been declared their implementation is tardy and far fetched. The goals of the National Policy for the Empowerment of Women (2001) is to bring about the advancement, development and empowerment of women. The objective of this Policy include:¹¹²

- i) Creating an environment through positive economic and social policies for full developments of women to enable them to realize their full potential.
- ii) The *de-jure* and *de-facto* enjoyment of all human rights and fundamental freedom by women on equal basis with men in all spheres – political, economic, social, cultural and civil.
- iii) Equal access to participation and decision-making of women in social, political and economic life of the nation.
- iv) Equal access to women to health care, quality education at all levels, career and vocational guidance, employment, equal remuneration, occupational health and safety, social security and public office, etc.
- v) Strengthening legal systems aimed at elimination of all forms of discrimination against women.
- vi) Changing societal attitudes and community practices by active participation and involvement of both men and women.
- vii) Mainstreaming a gender perspective in the development process.

¹¹² Kumar Meena, Op. Cit. p. 1 and 98.

- viii) Elimination of discrimination and all forms of violence against women and the girl child.
- ix) Building and strengthening partnerships with civil society, particularly women's organizations.

Precisely speaking we have a long list of laws for protection of women from sexual exploitation, harassment by her husband and in-laws, from portraying women as an object of sex, subsistence allowance during desertion and after divorce and from all sorts of discrimination in the matter of family disputes and property rights. The laws have covered a large area starting from livelihood/maintenance to molestation and employment to inheritance. This is known as formal equality enshrined and guaranteed in the Constitution of India.

Despite these galaxy of laws the status of Indian women is not better than ever before. Statistics shows that a woman is molested every 22 minutes and raped in every 2 hours in India. The literacy rate among woman is only 39.5% in comparison to 64% literacy of male persons. The majority of women in India are subjected to abuse and discrimination of worst kind from birth. Domestic violence against women, sexual abuse and dowry deaths are still rampant in Indian homes, despite higher levels of literacy. London based human rights watch dog, Amnesty International in a recent report said more than 40 percent of married Indian women were kicked, slapped or sexually abused by their husbands regularly.¹¹³ A woman is killed in less than two hours every day for and satisfying the dowry lust of her husband and in-laws. This practice is unheard of in large part of the world. Despite adequate laws dowry deaths registered an increase by 8-9 per cent and kidnapping of women and girls by 5 per cent in the year 2003. During the same period rape incidents also gave a rising figure by 3.3%. Status of women in relation to holding of movable and immovable property is

also very depressing. One would shudder to know that women worldwide hold only 1% property in their name whereas they contribute 2/3rd of the total work-time.

The lacuna is not in the law for the above depressing scenario. Deficiencies in the laws if any, here and there are also being corrected by way of progressive and pragmatic interpretations through judicial pronouncements. The vibrant judiciary has recently exalted and dignity of working women in particular issuing writs for providing safe environment at the work place to ensure protection of female employees from sexual harassment. These directions were given in the case of *Vishaka vs State of Rajasthan*,¹¹⁴ and reiterated in the case of *Apparel Export Promotion Council v. A.K. Chopra*,¹¹⁵ in the absence of suitable legislation. The Apex Court has also recently given directions to the Law Commission to come out with effective law to deal with the offences of child abuse *Sahshi Vs Union of India*¹¹⁶ In the case of *Githa Hariharan v. R.B.I.*,¹¹⁷ the status of mother has been elevated and has been brought at par with her husband in the matter of guardianship of minor children. In the State of Bihar there appeared to be discrimination in the matter of succession to property in the tribal society by virtue of State legislation. The legal position was examined in the case of *Madhu Kishwar v. State of Bihar*.¹¹⁸ The Hon'ble Supreme Court extended the judicial reprieve to the tribal females who were exposed to vagrancy by declaring that female relatives of the last male tenant have the constitutional remedy to stay on the holding so long as they remain dependent on it for earning and livelihood and the right of male succession shall remain in suspended animation till this situation is

¹¹³ Ibid at p. 1-2

¹¹⁴ AIR 1997 SC 3811

¹¹⁵ AIR 1999 SC 625

¹¹⁶ 1999 Cri. L.J 5025

¹¹⁷ AIR 1999 SC 1149

¹¹⁸ AIR 1996 SC 1864

over. These are a few classic examples of uplifting the status of women judicially.

Succinctly speaking we have enough legislation, which are taking care of rights and privileges of women. Thematic contents of Constitution and other laws in this regard are also supplemented by plethora of Indian Judgements. Despite these measures we have failed to give them equal status in the society, equal protection of law and the respect and dignity the women deserve. To attain this goal we need to change our attitude, mindset and behaviour as no amount of law would cure gender bias which has deeply settled in our mind.

From the over all discussions, above, we can conclude with the words of Ms. Nomita Agarwal that concerted efforts for protecting human rights of women in a large scale, leadership by advocacy groups, supportive legislations from the Government, improved implementation, legal literacy courses will go a long way towards actualizing womens' rights.¹¹⁹

¹¹⁹ Agarwal Nomita, Supra at p. 185.

CHAPTER - III

FEMALE FOETICIDE - AN OVERVIEW

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“Raising a female child is like watering your neighbour’s plant”

- A popular proverb in Tamil¹

3.1. The Concept

Today, the world is confronted with many dilemmas affecting the life and health of people. With the introduction of new technologies, and the advent of globalization, privatization and liberalization these problems have aggravated. The technological advancements appear to be doing harm rather than bringing benefit to the human society. The situation becomes difficult when law instead of controlling the situation, creates an opportunity for the perpetrators to misuse or abuse technology. Note, for example, female foeticide or infanticide. The technological advancements in bio-medical and genetic field have been misused to eliminate the girl child.

One of the most common and simple mechanism of eliminating the girl child is ‘female foeticide’. It is the act of determining the sex of the child in the womb and if it is found to be a female; to get the same aborted. ‘Foeticide’ means the destruction of the foetus at any time prior to birth. Infanticide means the unlawful destruction of a newly born child and is regarded as murder in law.² ‘Foetus’ means an unborn human from after the third month of Pregnancy until birth.³ It has been followed by the people all over the world for a long time in

¹ Elangovan. P. *Tamil Malai*, Chennai : Periyar Books, 1997, p.73

² Parikh C.K, *Parik's Text Book of Medical Jurisprudence Forensic Medicine and Toxicology* : C.B.S. Publishers and Distributors, 2000, p.72,

³ Lexican Webstor, *Dictionary*, Deliar Publishing Company, 1986, p.359.

one form or other due to one or the other reasons. But now with the scientific advancement it has become widespread; especially in the third world countries.

The problem of female foeticide has received little attention. The female foetus is readily sacrificed on the altar of expediency, individual convenience and legal technicalities. Easy access to the techniques of sex determination has given rise to female foeticide. In many countries, modern techniques of ultrasound scans and unuterio-sex testing which are basically designed to make pregnancy safer are ironically being abused for female foeticide. Millions of female foetuses are aborted creating a serious sex imbalance to give rise to other social problems in India and a few other South Asian countries. A study reveals that in a year around 6 million abortions took place out of which only a few thousand are legal. A survey carried out in Bombay during 1984 revealed that out of 8,000 abortions, 7999 were of female fetuses.⁴ In a much quoted study carried out in Maharashtra it is revealed that a Bombay clinic which performed 8,000 operations, 7,999 of which are girls. In South Korea 20,000 females are aborted every year. The same is true with China and several other third world countries.⁵

This gruesome act often go unnoticed and unreported. So there can be no direct evidence to establish the existence of this inhuman act. However there are some indicators which lead us to a positive conclusion about the existence of this practice. One of the basic indicators is the male-female Sex Ratio. Sex ratio is defined as the

⁴ Laxmi Devi, *Encyclopedia of Women Development and Family Welfare Series* – “Women and Family Welfare, New Delhi. Anmol Publications, 1998. p.141.

⁵ Shaleo Nigam : *Legal News & Views* : July 2000 (Struggle for Survival : Issues in Sex determination and female foeticide).

number of females per 1000 males.⁶ According to Prof. Ramesh Chandra the sex ratio of Indian population has always been of topical interest for the demographers, social scientists, women's groups, research scholars and various planners and policy makers.⁷ He further says while global population has increased threefold during the century from 2 billion to 6 billion, the population of India has increased nearly five times from 238 million (23 crores) to one billion in same period. The question is when population increases why is that India has such an uneven composition of population (inconsistency in sex-ratio) compared to most of the developed countries in the world?⁸

3.2 Sex Ratio at birth as an indicator

The U.N. Statistical Office and Populations division points out that sex ratios in India seem to suggest that it is an exception to the global rule that girls have a better survival rate than boys, since they are biologically stronger. The sex ratio at the international level is an average of 1050 females for every 1000 males. In India the sex ratio has steadily been declining over the years with the last census showing a sex ratio of 945 women to 1000 men. This indicates a significantly high number of "missing women". "Missing women" denotes the difference between the expected and actual number of living females. The following Table will show the sex ratio as per the census in last eleven decades.

⁶ Tiwari Satish, *Encyclopedia of Indian Government Series, Urban Development*, New Delhi: Anmol Publications, 2000, p.26

⁷ Chandra Ramesh, *Social Development in India*, New Delhi: Volume 2, New Delhi : Isha Books, 2004, p.235.

⁸ Ibid p.2., p.233

Table 1 : No. of Females per thousand males in India - 1901-2001

Year	'01	'11	'21	'31	'41	'51	'61	'71	'81	'91	2001
No. of female for 1000 males	972	964	955	950	945	946	941	930	934	927	945

[Source: Registrar General of India, Reported in Health Statistic of India; Central Bureau of Health Intelligence, Ministry of Health and Family Welfare, Govt. of India, New Delhi].

A preliminary look at the census data of 2001 reveals a grim scenario of the worsening situation. The sex ratio in the country had always remained unfavourable to females.⁹ The sex ratio of the child population (0-6) years has declined by 18 points at the national level from 945 in 1991 to 927 in 2001. In fact all states and union territories except Kerala, Tripura and Mizoram have reported fewer girls than boys under six years. The decline is most pronounced in Punjab, where the sex ratio in this age group (0-6 years), fell from 875 in 1991 to 793 (a decrease of 82 points) the shocking declines are also witnessed in Haryana (59 points), in Himachal Pradesh and Chandigarh (54 points), followed by Uttaranchal (42 points) Goa (31 points) and Maharashtra (29 points)¹⁰. In fact these declines are in areas which had already been flagged as showing low sex ratios among children and as regions which were having a rapid growth of sex determination clinics and questionable abortions, with a highly likelihood of female foeticides. Surprisingly, even Maharashtra, the first state that have banned the pre-natal sex determination tests, has registered a decline in the under-6 sex ratio, from 946 in 1991 to 917 in 2001 (a decrease of 29 points). Female foeticide has been attributed as one of the main factors to this phenomenon. The 1991

⁹ Ibid p.p. 234-235

census shows an alarmingly low sex ratio of less than 900 females to 1000 males in 54 district of the country spread over to 7 seven states.¹¹ The following table depicts the situation.

Table 2 : States (with number of districts) that have Sex-Ratios of Less Than 900

State	No. of districts with low child sex-ratio
Haryana	All 16 districts
Punjab	All 12 districts
Rajasthan	7 out of 27 districts
Uttar Pradesh	10 out of 63 districts
Gujarat	4 out of 19 districts
Madhya Pradesh	4 out of 45 districts
Tamil Nadu	1 out of 21 districts

[Source : www.censusindia.net]

The sharp decline in the female sex-ratios of certain districts, co-incident with reports of female infanticide and foeticide in these districts suggest that the reason is more likely to be infanticide or foeticide.

According to the Indian Medical Association, for instance, five million female foetuses are aborted every year. Keeping in view the seriousness of the problem, the National Human Rights Commission (NHRC, India) has asked the Medical Council of India to examine the ethical aspects of sex determination tests which it too acknowledges are causing a high rate of female foeticide.¹²

¹⁰ Census of India 2001, Paper 1 of 2001. Census Directorate, Publication – Brochure – Ministry of Health and Family Welfare, Govt. of India, New Delhi.

¹¹ Sheela R.C. and Athreya, Female Infanticide in T.N. Some Enlace; EPW of India. Vol. 33.No:7, April 26, 1997.

¹² Singh S.C. Pre-Natal Diagnostic and Female Foeticide, Supreme Court Journal Vol. 3. 2001.

child's right to be born.¹³ Most of the incidents will not come to light as it is done in strict secrecy and with the involvement of the parents, and other relatives. The clinics which conducts the foeticide will also keep it secret on account of commercial reasons. Therefore no ready statistics are available on this subject. There has been no national census of "at-birth sex ratios" nationwide.

So no official data is available for identifying the gravity of the problem. However, certain independent micro level surveys have been conducted by different Non-Government Organizations (NGO) and women's rights organizations. These surveys are mostly region-wise, area-wise or even localized. But, the results of these studies reveal that the number of females born in several areas is in a great degree less than the number of males. As the same situation is revealed by various studies in different parts of the country, the problem of female foeticide assumes a "national character". The sex ratio indicated in the Table 1 & 2 above has relevance to show that there is a gap between the expected rate of female births and actual births of females in the absence of an 'at-birth sex ratio'. This gap and the results of various studies as mentioned indicates that abortion of female foetus are taking place in large number in India.

The National Law School of India University, Bangalore has conducted an extensive study on this topic through their centre for Child and the Law and the data complied by the University with the help of available data from Government and Non-Governmental Agencies provides a serious insight into the gravity of the problem.

¹³ Desai, Nochiketa, "Born to die" in The Indian Post (Bombay), 7th Oct. 1988 published in Encyclopedia of Human Rights, Violence and Non-violence Series, Anmol Publications, 1999 p.197-198

A study conducted by Dr.M.K. Premi into the sharp decline of female sex ratio shows the possibility of large-scale female foeticide. It is summed up in the following table.¹⁴

**Table 3 : Sex-ratio at Birth and Children Alive (0-6 years)
in Madhya Pradesh**

	Total reported births	Born alive	Now alive	Sex-ratio at birth	Sex-ratio of live birth	Sex-ratio of existing children
Male	166	151	136	1000	1000	1000
Female	139	117	68	837	775	500

[Source NLSIU : Bangalore]

The Sex-ratio at birth which is reflected in this study is interesting because it seems to contradict the probability of an equal number of girls being born as there are boys. This trend is unfortunately not restricted to the particular study above but has become a common phenomenon.

A study conducted by Mr. R.P. Ravindra, during 1998 in Ludhiana to calculate the secondary sex-ratio (SSR), which is defined as the number of males born per hundred females showed the following the results:

Table 4 : SSR for the District of Ludhiana

Year	1981	1982	1983	1984	1985	1986	1987	1988
Males per 1000 females	105	105	113	113	113	112	114	122

[Source NLSIU : Bangalore]

¹⁴ NLSIU, *Female Infanticide & Foeticide : A legal perspective* – Published by Centre for Child and Law NLSIU, Bangalore.

These ratios are definitely indicative of sex-selective abortion of females, particularly towards the late 90's when sex determination tests became more popular.

A similar study was conducted in Kanyambadi block in Tamil Nadu where it was noticed that in 1997 the male to female ratio at birth was 923 : 826.

Accordingly to a study by the Morrison Institute for Population and Research Studies at Stanford University, the SSR for India is 108.7 males per 100 females.¹⁵

A sample study conducted in rural Haryana, illustrates the point that female foeticide distorts the male-female ratio. It is found out that though there exist a growing disparity between the number of boys and the number of girls with the boys significantly outnumbering the girls, if the number of aborted female fetuses is added to the number of female infants, the ratio is in favour of the females. Thus there are several 'missing' female children in India. The special studies on the 'Declining Sex Ratio' and the problem of Female Infanticide sponsored in 1993 by the moral Department of Women and Child Development, New Delhi had revealed that while the practice of Female Foeticide is a common phenomenon in urban areas the problem of female infanticide is a localized phenomenon limited only to certain communities in the States of Tamil Nadu, Bihar, Gujarat, Punjab, Haryana, M.P. and Rajasthan.¹⁶

¹⁵ Ravindra R.P, "*The Mith about Sex Determination Test*", *Fact against myth*, Mumbai; Vol.III. June 1998.

¹⁶ Chandra. Ramesh : Op. at: p.123.

**Table 5 : Age-Sex Profile of the Child Population (0-5 years)
in Rural Haryana**

	0-1 Age category	0-5 Age category
Male	15	94
Female	10	65
Female-Male Ratio	667	691

[Source NLSIU : Bangalore]

The Table No:5 shows a distorted sex profile; believed to be the result of abortion of female foetuses in the community. The hypothesis seems to be correct, because upon adding the number of aborted female foetuses to the number of existing females the sex-ratio tilts in favour of females as it should be have under normal circumstances as shown in Table No:6.

**Table 6 : The Sex Ratio as Corrected by Adding the Reported
Incidences of Sex Selective Abortions in the
Study Presented Above**

	0-1 Age category	0-5 Age category
Male	15	94
Female	17	93
Female-Male Ratio	1133	989

[Source NLSIU : Bangalore]

While female infanticide continues to be practiced in communities across India, the development of technology for the pre-natal determination of sex of the child has become immensely popular. It provides an easy way out from the moral dilemma of having to kill 'a living being', to the more affluent families who can now detect the sex of the foetus, and abort all unwanted girls. Thus urban areas show a wider gap in the sex-ratio of children at birth than in the sex-ratio of living children, indicating that girls are eliminated while still in their

mother's womb, rather than being killed after birth. Discrimination starts even before birth in the form of sex determination tests misusing the high technology of a minocentesis, resulting in a new kind of femicide, i.e. abortion of female foetuses.¹⁷

On the other hand, sex ratios among rural communities show a greater gap between those of children alive, as also a greater gap in the sex-specific IMR. Researchers say that the spreading of female foeticide among the so-called educated class has worked to legitimize female infanticide among the poorer communities.

3.3 CAUSES OF FEMALE FOETICIDE IN INDIA

In history, female infanticide was common among certain castes and tribes such as the Rajputs, Jats, Gujars, Ahirs and Sikhs. It was a custom widely accepted among these warrior tribes, where sons were 'needed' to defend the honour and more important the territories of the tribe. Added to that there were other social causes that led to female infanticide. The most important of these was the fact that rivalries and strict hierarchy between clans restricted the marriageable clans to which women could be given. Dowries and Marriage expenditures proved to be another burden on the families of the girls. On the other hand, raising unmarried daughters was considered disgraceful. Thus female infanticide provided an easy way to get rid of the girl child who was considered an unmitigated burden.

According to Prof. Ramesh Chandra the practice of two evils viz. female foeticide and female infanticide is mainly due to the strong preference for son and as such, these are responsible to a large extent for the ever-declining sex-ratio. A misuse of the modern

¹⁷ Devi Laxmi, *"Encyclopedia of Women Development and Family Welfare Series" – Women and Family Welfare*, New Delhi : Anmol Publications, 1998, p.141.

technique of Amniocentesis for sex determination is an added dimension to this problem.¹⁸ Prof. Ramesh Chandra has given some important reasons for the uneven composition of population and the sex ratio. They are listed below:

- a) Neglect of the girl-child resulting in their higher morality at younger ages;
- b) High maternal morality;
- c) Sex-selective female abortions;
- d) Female infanticide;
- e) Change in sex ratio at birth.¹⁹

According to Ram Ahuja in his article Population dynamic the reasons has said for sex imbalance are female infanticide, neglect of female infants, early marriage death consequent on child birth, bad treatment, and hard work of women.²⁰

This researcher also conducted a survey in to the problem and interacted with almost 300 to 500 people, at different points of time spread over to 12 states and covering about 21 cities including four metros and drawn the following conclusions:

1. There is a general preference among the people especially in the North and Western India in favour of male children. The preference is comparatively less in South India except in the state of Tamil Nadu.

¹⁸ Ramesh Chandra, *Women and Child Development*, Volume 5; Isha Books Delhi, 2004, p.123.

¹⁹ Ibid: p.235

²⁰ Ahuja, Ram, *Society in India:- Concept Theories and Recent Trends*, Delhi and Jaipur : Rawa Publications, Jaipur 1999, p.3111.

Table 7 : Preference for male child in various States as brought out in survey (Percentage of preference)

State	Preference for male child (Percentage-wise)	
	Yes	No
Andhra Pradesh	25	70
Bihar	82	8
Maharashtra	51	17
Delhi	66	12
Haryana	63	13
Goa	18	78
Gujarat	59	38
Karnataka	20	74
Kerala	15	82
Tamil Nadu	38	58
Uttar Pradesh	70	25
Madhya Pradesh	69	27

The spread of male preference is large in the Northern India while it is lesser in South. Another aspect is that those who expressed against the male preference were still greater in South. This researcher attributes the high level of education, progressive social out look, economic development and comparatively high degree of freedom experienced by the women in South India and the cultural differences as factors responsible for the wide gap in the opinions.

2. The people are aware of the existence and spread of the problem in the society. But there is no proper enlightenment among them. Many people approach this issue so lightly without knowing that killing a foetus is as gruesome as killing a newborn.
3. There are social and economic factors contributing to the commission of this crime. However, in the modern times the economic factor plays the major role.

4. With the liberalization of economy and globalization of market and habits, a new consumer culture has invaded Indian Societies at all levels and it has added to the menace.
5. As against the common belief that the women, especially the 'mother' is a passive participant in this act due to the pressure from relatives and husbands, it is found in the survey that they too are active participants and quite often, they take the lead and initiative.

**Table 8 : Role players in female foeticide in
different groups as found in the survey
conducted by the researcher**

Role Player	SC/ST	Backward Class	Others	Economic ally forward class	Economic ally backward class
Husband	22	18	21	17	20
Relatives	30	31	22	13	17
Self	7	14	20	21	18

6. About 80-90 percent of the total abortions taking place in India are female foeticides.
7. In areas where the female infanticides have been in practice, female foeticide has become a substitute method. The main factors for this shift in techniques are (1) convenience, (2) easy method of execution, (3) element of secrecy, (4) comparatively less cost, (5) easy accessibility, (6) lesser trauma attached to the act and (7) comparatively lower chances of being booked by law.

8. Though the existing law is strict and provides for a large number of safeguards its implementation has not been effective.
9. The problem shall not be viewed in isolation and must be viewed as part of the larger atrocities against women and as an issue involving her human rights to take birth and to live as human being.

The problem of female foeticide has a social background, which would bring out the disparity in the myth and reality on women hood in Indian Society. On one hand the woman is glorified as the symbol of 'Sakhti' and all sorts of prosperity.²¹ She is worshiped as goddesses. On the other hand, she is subjected to all sorts of atrocities and her very existence as a human being is threatened. She is considered as a burden in the society. She is denied even the basic necessities of life. The female gender is oppressed at every walk of life. It would be interesting to trace the history of the practice of female foeticide in this background.

3.4 Background of Female Foeticide:

In ancient times in all Patriarchal societies the son was valued and desired more than the daughter because he was considered a permanent economic asset for the family, since he lived with his aged parents and did not migrate like the daughter to another family after marriage. Rituals and practical considerations make a boy's birth essential whereas both in terms of rituals and practicabilities, a girl's birth is seen to entail expenses and problems in future.²² It is a well-known fact that certain families in India did not like the

²¹ Giriraj Shah, *The Encyclopedia of Women's Study*; Gyan Publishing House, New Delhi, 1995, p.10

²² Singh J.P. *The Indian Women - Myth and Reality*; Godavari D Patil and Madumati Patil "Girl Child a study in Familial and Societal Negligence; New Delhi : Gyan Publishing House, 1996, p.110.

daughters to be added to their families. The daughters were killed immediately after their birth, by dashing their heads with force against the stones or rocks. That system has gone but still there are examples when for the family it is a great occasion for a son's birth but not for a daughter's. Though we find mention of prayers being said for the birth of a son we do not come across any reference to eliminating daughters at birth in the ancient Vedic period. In Vedas in case where the (child in embryo) of a Brahmin woman is destroyed before the sex of the child can be ascertained the person causing such destruction is called Vrunaha. 'Vrunaha' is the greatest sinner.²³

According to Arumina Boneah, the practice of infanticide or the willful killing of new born babies was widely accepted among ancient and pre-historic people as a legitimate means of dealing with unwanted children. The same has taken the shape of foeticide with the latest scientific and technological instruments.²⁴ Gender discrimination was strongly dictated in Manu's Code, according to which a female is under the custody of males from womb to tomb. According to Manu, author of ancient Hindu Moral Code, a man cannot attain '*moksha*' unless he has a son to light his funeral pyre. A male offspring alone guarantees *moksha*. According to Manu, a man "wins both worlds through a son and gains eternity through a grandson". Manu says a woman who gives birth to only daughters may be left in the eleventh year of the marriage. In the patriarchal society like India greater importance is given to the male child. The female child is not only considered a liability, but mothers who give

²³ Mitter D.N, *The position of Women in Hindu Law*, New Delhi: Inter-India Publications, 1984, p.66.

²⁴ Baruah Arumima, *Crimes against Children*, New Delhi : Kalpaz Publications, 2002. p.9.

birth to female children only, do not get much respect in the family as compared with those who given birth to male children.²⁵

In Indian culture it is usual for girls and woman to eat less than men and boys and to have their meal after the man and boys had finished eating. The boys are provided better facilities than the girls despite the fact that the daughters may prove to be more faithful and loving to their parents and families. It is said "a son is a son until he gets a wife, but a daughter is always a daughter". Micro studies have shed light on the fact that sex is the main determinant of infant nutrition irrespective of economic development. Boys are breastfed longer, given more of wearing, foods and get a bigger share of whatever food is available.²⁶

Female foeticide is more rampant among Hindus (rather than Muslims or Christians) families. Among Hindus sons are looked to as a type of insurance for providing future income. With this perspective it becomes clearer that the high value given to male decreases the value given to females. Again, the sons become the crutch for parents to lean on in their old age. On the top of it, when they get married, they bring brides along with dowry. There are historical reasons for the same. In the caste driven, Hindu society elimination of female children was prevalent among the higher castes and it got slowly spread to other castes also. Marriage in the Hindu fold of life is traditionally essential for procreation and the continuation of the family life. The birth of a son is greatly desired, and the godly blessings for the expectant mother are that she will give birth to a male child. Even the blessing showered on the bride at the marriage ceremony is "Ashta Putra Sowbhagyavati Bhava" (May you be blessed with eight sons"). A short time after marriage, the

²⁵ Madhurima. *Violence against women, Dynamics of Conjugal Relations*, New Delhi : Gyan Publication House, 1996, p.p.84-85.

ceremony called Garbhandhana is performed for the husband. It consist of an offering and a prayer to the Sun by the husband and wife for the conception of a son. The last line of this prayer by the husband is, "Birghayasm Vamasadharam Putramjanaya Subrate" ("Oh faithful wife give birth to a son who will live long and perpetuate our line". Three months after conception the Pumsavana ceremony for obtaining a son is performed.²⁷ In the Atharva Veda, one of the four most sacred texts of Hinduism, mantras are prescribed for chanting so that if by chance the foetus is a female it will be transformed to a male. Other texts mention that if a female child is born it is an arista or ill-omen.²⁸

The archival sources and census data since 1931 Census certainly indicate that in Gujarat and in the North Indian states, which according to the latest census have an alarmingly low ratio of female children, certain castes regularly practiced female infanticide. The castes with a much lower proportion of female children compared to males were: Lewa Patidars and the Rajputs in Gujarat (then part of Bombay Presidency); Jats, Rajputs, Khutris and Moyal Brahmins in undivided Punjab; Rajputs and Jats in what is now Rajasthan (previously Rajputana); Ahirs, Jats, Rajputs and Gujars in the United Provinces (now Uttar Pradesh). Two points need to be noted. First, given the regular practice of female infanticide by these castes in the 19th and 20th centuries and also the resort to deliberate neglect of female infants after the Female Infanticide Act was passed in March 1870, a female infanticide belt covering the north Indian states and Gujarat can be identified. Second, in view of the repeated and unflinching record of low ratio of female children in the castes named

²⁶ Devi Laxmi, Op. Cited. p.141

²⁷ Antoine R. 'The Hindu Samskaras in Delenry' in Religious Hinduism: A Presentation and Appraisal [Edited by Newner. G. and Newner. J.] St. Paul Publications, 1964; See also Altekar, AS, The Position of Women in Hindu Civilisation. The Culture Publication House, B.H.U. 1938.

above, the censuses enumerators started saying that these castes have 'a tradition' of female infanticide. Thus the Census of India Report for 1931 provides statistics for three decadal census from 1901 to 1931 and states that castes with 'a tradition' of female infanticide and having a low ratio of females per thousand males in Punjab, United Provinces and Rajputana were: Jats (Hindu), Khatri, Rajputs (Hindu) and Gujars. Noticing the low ratio of females per thousand males among the Lewa Patidars of Charotar in central Gujarat, the author of the 1901 Baroda Census observes that "the black stigma of perpetrating female infanticide has been branded on this caste from olden times."²⁹

Though caste is pervasive in Indian society and politics, the government of post-independence India decided to discontinue caste enumeration in the census. Therefore it is difficult to say if the castes which previously resorted to female infanticide still maintain that tradition. However, when one looks at the census data on child sex ratios in the post-freedom period, the states and areas in the north and the west which were earlier notorious for female infanticide and deliberate neglect of female children still retain that notoriety. The female infanticide belt of the past remains substantially unchanged even now.

It is not difficult to surmise that the dominant castes in rural North India and in Gujarat, which in the past tried to maintain their dominance through female infanticide, are continuing the same strategy through female foeticide thanks to the advances in medical technology. Assuming that one or more dominant castes in a state which in the past practiced female infanticide are continuing to resort

²⁸ Kumar Arvind, "Encyclopedia of Human Rights, Violence and Non-violence Series – Societal Violence and Unrest, Lucknow and New Delhi : Volume II, published by Institute for Sustainable Developments, Anmol Publications, 1999, p.44.

²⁹ Viswanath L.S, *Female Foeticide and Infanticide* : EPW, New Delhi : September 1, 2001.

to it or foeticide, and the low ratios of female children in the dominant caste(s) affect the child ratios in the state as a whole.³⁰ The right to live had been denied to the girl child since long as the British discovery of female infanticide in India found it existing in 1789 among the clan of Rajputs and the census data from 1891 Census onwards of the Patidars (as low as 659 females to 1000 males in some patidar villages in 1891) and even earlier from 1881 Census onwards of Jats, Gujars and Ahirs in the North-Western Provinces and Awadh (815 Jat females, 831 Gujar females and 976 Ahir female per thousand males in the 0-4 age group in 1881) till the 1931 Census point to the killing of female infants or deliberate neglect of female infants. Arguments such as how do you know since we do not have caste-wise sex ratios after independence may amount to ignoring the facts repeatedly presented by the census for certain dominant castes for half a century from 1881 to 1931.

The archival records show that once the raj was firmly established, the colonial government took firm action in some areas by threatening the dominant castes which practiced female infanticide with confiscation of their agricultural lands if they did not give up the practice. The threat worked in Punjab and peninsular Gujarat. However, the colonial state developed cold feet after the so-called 'Mutiny' of 1857 and decided to go slow in its efforts to curb female infanticide.

The interpretation of the declining child sex ratio [females per 1,000 males in 0-6 age group] calls for considerable demographic expertise. Considerable for example, the contradictory trends revealed by the Censuses of 1991 and 2001. In 1991, the overall sex ratio declined and so also the child sex ratio, while in 2001, the overall sex ratio

³⁰ Kumar, Arvind, *Encyclopedia of Human Rights, Violence and Non-violence Series – Societal violence and unrest Institute for sustainable development*, Lucknow and New Delhi : Anmol

increased but the child sex ratio declined. Sex ratio imbalance reflects an asymmetry of survival. This asymmetry can be viewed as a case of entitlements failure.³¹

In the most recent census publication the census commissioner hints that 477 districts consisting of over 82 percent of the districts register an increase in sex ratio of the population in the age group seven plus. Of these, 215 districts have recorded substantial gain of over twenty points. The possibility of some positive impact on the enumeration of adult female population in many parts of the country during the current census due to various factors such as gender sensitive approach in training and publicity measures also cannot be ruled out. Majority of the districts recording gains of above 20 points is from Uttar Pradesh, Uttaranchal, Bihar, Rajasthan, Assam, Madhya Pradesh, Tamilnadu, and Arunachal Pradesh. It is noteworthy to mention that all the districts of Uttaranchal, West Bengal, Jharkhand, Kerala, Andaman and Nicobar Islands show an improvement in the

sex ratio age seven plus at the Census of India, 2001 as compared to the 1991 Census. Among these nine districts of Arunachal Pradesh, seven districts of Uttaranchal and four districts of Uttar Pradesh have recorded an increase of 50 or more points in the sex ratio age seven plus.³²

One can argue that if the 2001 Census has been more gender sensitive than before, there should have been an improvement in the child sex ratio as well but this has not happened. It seems that a real decline in the child sex ratio must have wiped out the gains of

Publications Private Limited, 1999, p.p. 195-196.

³¹ Agnihotri S.B, *Sex Ratio Patterns in the Indian Population A Fresh Exploration*, New Delhi : Sage Publications, 2000, p.210.

better enumeration of the girl child. There is convincing evidence in the district wise analysis of 2001 Census data that the decline in the child sex ratio is all pervasive and has occurred throughout India while it is more pronounced in Punjab, Haryana, parts of Himachal Pradesh and Gujrat apart from cities like Chandigarh, Delhi, Surat, Mumbai, Kolkata, etc.

Census Paper No 1 Supplement provides comparable data for 1991 and 2001 on the child sex ratio in 577 districts of India [this excludes 14 districts of Jammu and Kashmir where the 1991 Census was not conducted and Kutch District of Gujrat and Kinnaur District of Himachal Pradesh where the 2001 Census was not conducted in February]. As many as 456 district out of 577 record a decline in the child sex ratio in 2001 compared to 1991. In 70 districts, the decline is in the order of 50 points. In several districts, the decline is more than 100 points. Regardless of the quality of Census enumeration in the Census as of 1991 and 2001, one can conclude that the decline in the child sex ratio is a real phenomenon and not a statistical aberration.

The census commissioner observes:

"The decline in child sex ratio is assuming an alarming proportion in certain districts of Punjab, Haryana, Himachal Pradesh and the decline in majority of the districts in other states and union territories across the country [Uttar Pradesh, Madhya Pradesh Chhatisgarh, Orissa, Karnataka, Assam, Delhi, etc] is rather intriguing. The social cultural bias against the girl child might have been possibly

³² Census of India 2001, Paper 1 Supplement :56 Department of Public Relations, Government of India

*aggravated by recent medical support in terms of sex determination tests and requires further field investigation”.*³³

Literacy ratio is calculated in the Indian census since 1991 for the age group seven plus. Therefore the 0-6 age group population is subtracted from the total population. For a proper study of the child sex ratio, one needs data on sex ratio at birth and at ages one, two, three, four and five but single year age data are not very reliable. Data present figures for the 0-4 and 5-9 age groups. These data have to be analyzed both for 1991 and 2001.

The most comprehensive study of juvenile sex ratio [JSR] for the age group 0-9 years was done by Satish Agnihotri [2000]; based on 1961 and 1981 Census data. His book *Sex Ratio Patterns in the Indian Population: A Fresh Exploration* gives a valuable insight into this complex phenomenon. Commenting on sex selective abortions and female infanticide, Agnihotri says: “The rise in sex selective abortions and emergence of female infanticide in various parts of the country are two serious aspects of excess child mortality”³⁴.

Agnihotri brings out the close linkage between female foeticide and female infanticide. He argues: “Prenatal selection is a new technological tool which has gained acceptability as something scientific, neutral and performed by the ‘professionals’ concerned. It has accorded legitimacy to the elimination of a child on the basis of its sex. Where money and facility are available, it is resorted to buy the social superstratum. Those who do not have the access to this

³³ Census paper I. Supplement 53.

³⁴ Agnihotri, *Op.cited* p.234

facility look for 'affordable' alternatives since the process has been 'sanctified' anyway. This 'affordable' alternative is infanticide. As the incidence of infanticide spreads, those who practise prenatal selection occupy of 'holder' pedestal. After all, they are not resorting to the 'barbaric' or the 'cruel' practice of killing a new born infant. So the doctor who goes around the countryside with this 'mobile facility' in this new luxury car can claim to be doing social service. The verdict is now passed not on whether the elimination on the basis of sex is acceptable or otherwise but on which method is more acceptable-sex-selective abortion or infanticide. The technological alternative gets legitimized in comparison with infanticide while sanctifying the idea of elimination of the child on the basis of sex. This in turn spreads the practice of infanticide further among those who do not have access to the facility, e g, high castes in rural Bihar, or those who cannot afford it, e g, rural poor in Salem district in Tamil Nadu. Notwithstanding the spread in the 'facilities' for prenatal selection, it will continue to remain beyond the reach of a large number of people in foreseeable future. The two processes will therefore, feed on each other³⁵.

The registrar general has published data for all the 593 districts of India. (Census Paper 1 Supplement 2001). In Table 9, the distribution of the districts according to the range of sex ratio for 0-6 population and in Table 10, comparable data for the seven plus population, for 577 districts for which comparable dates for 1991 and 2001 are given. The districts are classified into sex categories: (Child

³⁵ *Ibid* at p.239

Sex Ratio)(A) 1,000-1,049 (B) 950-999 (C) 900-949 (D1) 850-899 (D2) 800-849; and (D3) Less than 800.

**Table 9 : Distribution of Districts by Ranges of Child Sex Ratio
in Age Group 0-6 – India : 1991 and 2001**

Sex Ratio (0-6)	1991			2001		
	Number of Districts	Population (Million)	Per- cent	Number of Districts	Population (Million)	Per- cent
1000-1049	21	8.67	1.04	8	3.87	0.38
950-999	306	454.01	54.27	242	403.83	39.38
900-949	181	287.91	34.41	208	381.36	37.59
850-899	68	83.49	9.98	71	155.66	15.34
800-849	1	2.57	0.31	32	47.85	4.72
Less than 800	-	-	-	16	22.08	2.18
Total	577	836.65	100	577	1041.65	100

(Source : Spplement I, Census Paper 2001. Registrar General Public Census Directorate, Govt. of India, New Delhi)

In 1991 there were 21 A category districts. The figure dwindled to eight in 2001 likewise in B category, the figure came down from 306 to 242 during the last decade. In category C, the number of districts went up from 181-208, in D1 from 68-71, in D2 from 1 to 32 and in D3 from zero in 1991 to 16 in 2001. The D category districts are the daughter killers. The acronym is DEMARU where d stands for daughter, e for eliminating, m for male, a for aspiring, r for rage and u for ultrasound, that is to say: daughter eliminating male aspiring rage for ultrasound. The D category districts are indeed the blackholes, in India's demographic transition and a symptom of the collapse of the civilization.

Those familiar with the file situation in Punjab, Haryana, Himachal Pradesh, Chandigarh and Delhi know that the ready availability of

doctors during the ultrasound test and consequent female foeticide, the good transportation network and the ability to pay for the services of the mobile doctors are factors responsible for the widespread recourse to ultrasound in rural areas also. According to Kohli, As the girl child is a neglected lot. Out of 13 million girls born every year about 2 million die before reaching the 15th year.³⁶

Table 10 : Distribution of Districts by Ranges of Sex Ratio of Population Age Seven and Above – India : 1991 and 2001

Sex Ratio (7+)	1991			2001		
	Number of Districts	Population (Million)	Per-cent	Number of Districts	Population (Million)	Per-cent
1050+	18	21.2	2.53	26	40.32	3.97
1000-1049	47	67.76	8.09	65	90.77	8.95
950-999	139	209.45	25.03	152	277.91	27.29
900-949	162	243.40	29.09	170	315.49	31.09
850-899	115	171.28	20.47	108	194.35	19.15
800-849	73	97.86	11.70	46	86.92	8.57
Less than 800	23	25.70	3.07	10	8.89	0.88

There are many reasons for the practice of female foeticide. Poverty is a primary factor responsible for the same. The family which is indulged in the practice make certain common rationalizations as under:

“....we don't have enough to eat, how can we feed the girl”.

“.... She cannot go around naked, the boys can wear a loin cloth and carry on”

“.... Its only because I did not want her to suffer like me”.

³⁶ Kohli. A.S. *Research in Social Welfare Series*, Delhi : Anmol Publications, 1997, p.178.

But these are all one small aspect of the larger problem: as we can see that the same practice is followed in rich families also. Before analyzing the various factors causing female foeticide, it would be interesting and helpful to have brief look into the status of women in patriarchal societies in India; as the problem of female foeticide is directly connected with the status of the women in society.

Status of women in Indian Patriarchal Society

Women are the producers but not the owners of property, as ownership is determined by residence within the kin:

Consequently,

- (a) all property is vested in and exercised by the male
- (b) this results in a strong preference for sons since they are needed to ensure that property remains within the kin
- (c) since ownership is passed on to male descendants, the 'lineage' can be carried only through them.

Women's labour is undervalued as they practise no control over the products of their labour:

Consequently,

- (a) women are treated as inferior creatures and subjected to violence – both physical and psychological.
- (b) this status of women is internalized to an extent where women themselves view the fact of 'being born a women' as a 'birth defect'.
- (c) women are not paid at par with men.

Women's freedom is controlled by controlling their sexuality. A premium is placed on the chastity of women, which is deemed to reflect the male

honour. Thus the sexual purity of women is glorified at the cost of controlling their mobility, and freedom.

Consequently,

- (a) Ceremonies marking the sexuality of females are socially important and have to be performed even if not always affordable.
- (b) Hypergamy, or the practice of marrying daughters into higher caste groups, is widespread. This implied that a woman – the domain of the family's honour – can lose her virginity only to a man of a higher social status than her own family.
- (c) Exorbitant dowries are the price families pay to have their daughters married off into higher classes.
- (d) Daughters are seen as an avoidable social and financial burden.
- (e) Any uprising of women for her rights are oppressed by alleging unchastely.

Though women in the lower caste groups claim a greater degree of independence in terms of marriage etc., they are the most common victims of sexual abuse by men from the higher caste groups, which is also a means of emphasizing social patriarchy.

Also, the dowry system and other perceived 'costs' of bringing up a girl child have firmly taken place among the lower caste groups, both due to emulation of, and the legitimization provided by these practices among the upper castes.

Consequently,

- (a) Female infanticide and foeticide are common even among the lower castes.

3.5. The Rural Scene

The National Law School of India University, Bangalore has prepared a paper on the problem of female foeticide. They have relied upon some case studies done by different researchers. The finding of the case study is summarized as under:

I. A case study of the Kallar Community of Usilampatti in Madurai District of Tamil Nadu – Study of society for Integrated Rural Development (SIRD).

The Kallars are agricultural community also practiced sustenance agriculture till the onset of the Green Revolution in 1950. With the onset of revolution and building of the Vaigai Dam, part of the land in the region was covered by the irrigation scheme, while the rest of the land was dependent on the rains. The farmers in the irrigated are shifted to cash crop cultivation and it has resulted in widespread disparities with farmers in the rain-fed region. According to the researchers this economic disparity disturbed the traditional system of kinship marriages. It was replaced by marriages on the basis of huge dowries, which became a status symbol. Even the dry-land Kallars adopted the dowry system.

It may be interesting to note that though a higher number of Kallars were not harassed for dowry, female foeticide is the most common among them. This suggests the presence of other reasons for this practice.

An important reason if the impact of the Structural Adjustment Programme (SAP) on the status of women. With the shift from investment capital to financial capital that came about as a result of SAP many Kallar families took to money-lending, and the Kallars

soon acquired the status of the economic mafia. This only helped to increase the preference for a male child, as this new power would need to be exercised through males. On the other hand the condition of women in the context of marriage has deteriorated with only 18 out of 120 wives saying that they led a happy married life with their wishes being respected. The rest were victims of both physical and sexual abuse within marriage – a situation which had left deep psychological scars on them. They viewed their gender as being responsible for their condition, and openly admitted an unwillingness to bear daughters as ‘they would have to go through the same pain and suffering’.

The practice is common-even amongst Kallars who work as wage-labourers probably since it has the sanction of the richer section of the community.

II. *A Case Study of the Gounder Community of K.V. Kuppam Block, in North Arcot Ambedkar District Conducted by Dr. Sabu George as an Incidental Part of His Study of Infant and Child Growth and Survival Patterns, in April 1987.*

This case study presents an interesting situation where female infanticide is practiced mainly amongst the Gounder community in the region (Out of the 18 cases of infanticide that were discovered, 17 occurred among the Gounders). The Gounders are a consanguineous group and most marriages take place between uncles and nieces, or between first and second cousins. Thus the causes in these situations would have to be very different from those in the north where female infanticide is associated with hypergamy.

The authors have pointed out, however, that the Gounders are as affected by the 'cost of raising daughters' as any other community, implying that daughters may be considered a burden.

III. A Case Study of the Rural Communities of Selected Talukas of the Salem District Conducted by VRDP

This case study revealed that the caste system has a deep impact on the people.

One of the important results is a very strict rule governing marriage, which results in a restricted choice with regard to spouse. However, since it is the woman who has to be married into a higher caste, she faces more difficulties in this respect. Huge dowries have to be paid as incentives for the marriage. In recent years the amount given and demanded in dowry have reached ridiculous heights, following urbanisation and a consumerist culture. In a situation, when daughters are a financial burden, their parents have one of two choices left – the first is to ignore the rigid caste rules and take a liberal outlook at the risk of alienation; and the second is to 'avoid daughters'. Not surprising then that most families choose the second and easier option.

Another factor that might be responsible for aggravating the practice is believed to be the Family Planning Programme of the government.

IV. Case Study of the Rural Communities in the Karimangalam Block of Dharampuri District in Tamil Nadu Conducted by Search

The study area is backward and arid region in the Dharmapuri district of Tamil Nadu. It is densely populated, and is characterized by mass poverty, large scale unemployment, and a low level of infrastructure development. The health facilities are also inadequate with only 7 primary health centres catering to a population of 95,000 people.

The study revealed that the primary factor for female infanticide in this region was the status of daughters as a financial burden, in the context of the deteriorating economic conditions. In addition to that, the pressures of dowry, domestic violence and alcohol induced abuse often lead women to decide not to have daughters so that their daughters do not have to share their fate.

There is also a strong preference for a son which can be attributed to the patriarchal nature of the community. The norms of this community allow only the son to inherit property and carry on the family name. Consequently he is considered the parents' only support in their old age. The pressure for a male child is therefore exercised on the women by her entire family as well as the community. A woman who is unable to bear male children is made a social outcaste.

The bias against the girl child exists as much amongst the rich as it does amongst the poor. While in the richer classes it is more the desire for a son, to inherit the property and carry on the family name, rather than hostility towards daughters that leads to female infanticide, in the lower classes the primary cause is an unwillingness to rear daughters expenses associated with them.

**V. A Case Study of Rural Communities in North Bihar
Conducted by Adithi, in 1993-94**

Female infanticide seems to be wide prevalent in certain districts of North Bihar as is evident from the skewed sex-ratios. The causes of this practice are described as being an obsession for sons since he is the one to carry on the family lineage and provide for the family when he grows up. The daughter, on the other hand, is associated with expenditure on dowries, which attaches a negativism to her birth. It is not hard to imagine such attitudes given the male dominated patriarchal structure of the society.

**VI. A Case Study of Rural Communities in Bhind and Morena
Districts of Madhya Pradesh Sponsored By The
Department of Women and Child Development, Ministry Of
Human Resources Development, Government of India, in
1994³⁷**

The authors say that their research indicated that the incidence of female infanticide in this region was very caste specific. The skewed sex-ratios point a finger towards the Gurjars, the Yadavs, and the Rajput communities. Another interesting observation made was that these communities exhibit still more distorted sex-ratios, where they live in villages entirely or predominantly inhabited by themselves. These communities have largely been left untouched by literacy programme, economic development and any alternative set of values. The literacy rate among the groups is very low. The women are strictly forbidden from working outside the house and chores ~~such as~~ collection of water, etc. (which are normally done by women) are carried out by men.

³⁷ Premi Roja, *Ban to Die* – Search Bulletin. Cited by NLSIU in the information Bulletin.

3.6 The Urban Scene:

The above case studies relate to the rural areas and economically and socially backward sections of people. But the shocking facts brought out by a recent survey conducted by India Today shows that the situation in the urban affluent society is also in no way different. The report of the survey as published by the India Today³⁸ starts with a reference to the Novel Pinjar, written by the noted Punjabi novelist Amrita Pritam wherein the joy of three sisters are depicted as the birth of a son to their mother and at a later stage when the elder daughter was abducted by a Muslim youth, but she manages to escapes and return to her parents. "Go away, die or disappear. You are a daughter – how can we take back a kidnapped, humiliated girl? You should have died before birth" lament her parents.

This novel was written in the social background of pre-partition India' in Punjab; when girls were considered 'burdens' and parents killed or abandoned their newborn girls. Half a century later, modern urban India – with all its social, cultural, educational, economic and technical advancement – still clings to the same beliefs. It is evident from the sex ratio in the 0-6 age group in many urban centres as found in the survey. The table shows the comparative position of sex ratio in the above group in different urban centres as per 1991 and 2001 census.

Table No:11

Cities	1991	2001
Delhi	904	850
Mumbai	942	898
Pune	943	906

³⁸ India Today : November 10 , 2003

Amristar	861	783
Patiala	871	770
Ambala	888	784
Gurgaon	845	863
Faridabad	884	856
Kurukshetra	868	770
Ahmedabad	896	814
Vadodara	934	873
Rajkot	914	844
Jaipur	925	897
All India	945	927

(Source : India Today, November 10, 2003)

The survey by India Today reveals that, the most prosperous states of India like Delhi, Punjab, Haryana and Gujarat have the lowest sex ratio. The most affluent pockets in some cities show the sharpest drop. For example, the South-West Delhi, where some of the richest and most educated of Indians reside, the child sex ratio is only 845 as against 904 in 1991. This researcher has noticed another phenomenon during the study. Among the majority of rich Gujarathi and Marwari businessmen, the first child is male. This stranger phenomenon in the light of the predominant male preference among the communities is a clear indication of female foeticide at large scale. The situation in India is so serious enough for the U.N. to urge India to take urgent steps to address the problem.

The heinous practice of female foeticide in villages, a result of the age-old belief that a male child is necessary for devolving inheritance, is now an urban reality. Addressing the issue with all its seriousness the Union Health Minister Mrs. Sushma Swaraj says "If the enactment of a law was the only thing needed to curb this menace this would have stopped long ago..... Even rising education levels

have not shattered the myth that having a son is the solution to every emotional economic, spiritual and social problem in life.³⁹

As the Minister has rightly put it, the menace is continuing in spite of a stringent law is in force. The Doctors who do the heinous act are smart when it comes to ducking the law. They rely upon code words to circumvent the provisions of law with respect to disclosure of the sex of foetus. The sentences like "the sky is blue" and "your baby is fine." "baby will play football" are used to indicate that the child is male. The code like "you are in the pink of health", "your child is like a doll" or "your baby will dance" etc are used to indicate the female child.

3.7 Case Studies

The India Today also brought out the following three case studies:

Case I : Naina Sukhija, 39 years

Ten years after she delivered her second daughter, she is being forced by her husband and in-laws to produce a male child. Elders of the joint family have told her husband that he won't get a share of the family property since he has two daughters, no son. Sukhija already had an abortion after an ultrasound revealed a female foetus. Her doctor warns against another abortion. But Sukhija says she has no choice.

Case II : Prateekshan Mehta, 31 years

Ever since the birth of her daughter, her mother-in-law hasn't stopped berating her, pointing out that all her husband's cousins have

³⁹ Mrs. Sushma Swaraj : Interview with India Today, November 2003

sons. The mother-in-law insists that to perpetuate the family name, she too must have a son. "She tells me to be prepared for an abortion if I conceive a girl," she says. Her husband agrees with his mother. What does she herself want? "I don't know".

Case III : Ananya, 18 months

The newborn was found abandoned at the Danapur locality in Patna in March 2002. Two more girls were abandoned in the same area around the same time. She was taken in by the NGO Shakti Vahini, who later found an adoptive home for her. Like her, Apoorva, now two years old, was found abandoned in the Danapur locality. Found with grievous injuries on her body, she now lives with her adoptive parents.

A few more instances reported recently are given below:

1. Killed because she born no son:

A wife in Davanagere was murdered by her husband for not giving birth to a male child. Sarojamma married to Naganaika for 12 years had four daughter.

The New India Express, Bangalore, July 12, 2000

2. Man sets wife ablaze:

In a horrifying incident, a housewife and her two children were set ablaze by her husband and mother-in-law at K.P. Agrahara in Bangalore. In her statements the deceased Samina told the police that her husband and mother-in-law were harrassing her for not bearing a baby boy and set her and her children ablaze.

The New India Express, Bangalore, October, 2000

3. Female infanticide:

The infant was suspected to have been killed by administering an overdose of sleeping pills, in Darmapuri district, Tamil Nadu.

The Times of India, Bangalore, August 07, 2000

4. Girl Child Killed:

A new born girl child was poisoned to death by her parents and grant parents in a village in Dharmapuri district. She was the woman's third girl child.

The Times of India, December 18, 2000

5. Girl Child Sold:

Caught in vicious cycle of poverty and hunger the Lambada tribals (Andhra Pradesh) are selling their girls.

The New India Express, Bangalore, May 02, 2000

6. In Rajasthan a bakery owner sold his wife of raise funds to run his business.

The New India Express, Bangalore, July 12, 2000

7. 25% Girls born in India Die in 15 years:

Of the 12 million girls born in India each year $\frac{1}{4}$ do not survive to celebrate their 15th birthday.

The New India Express, Bangalore, August 24, 2000

A Workshop Report : Organised by Vatsalya on 10th March 2002 at Jhansi, U.P. (These case studies has been narrated by Dr. Sanjaya Sharma, Associate Prof. Medical College, Jhansi on the workshop regarding "Female Foeticide and its various Critical Aspects)

Case Study I – Ramrali:

Ramrati has 3 girls. The desire to have a son led her to commit four female foeticides with the result that now she suffer from conical cancer.

Case Study II – Kiran Kumari:

Kiran Kumari is first child was a girl. Hence was she got pregnant the next time, she went for sex determination test. On finding the female foetus, the abortion was conducted in the 4th month. This was dangerous. Now she wants to become pregnant but has not succeeded yet.

Case Study III - Shymadevi:

The couple already had three girls so they fourth time the decided for the test. On confirmation of the female foetus, they decided to abort it but since the Register Medical Practitioner (RMP) was very casthy, they asked the local dai to do the needful. Dai's untrained hands proved fatal Shyma Devi died of severe health problems.

3.8 Factors Responsible for female foeticide

The above case studies reveal that there are various factors, which are responsible for the practice and continuance of female foeticide. But none of these factors identified as responsible; can be held solitarily responsible, as there is an antithesis for all these factors. However, this researcher attributes the following factors are mainly responsible for this practice.

- 1. Poverty**
- 2. Male preference**
- 3. Dowry**
- 4. Pressure from husband and relatives**
- 5. Stigma attached to women**
- 6. Illiteracy**
- 7. In security**

Poverty is the chief and immediate cause for female foeticide. In societies, where the daughters are perceived as an economic and social burden on the family, the birth of a female child is the most unwelcome factor. The family needs to incur more expenditure for bringing up the girl child. The parents feel that they must devote more time and resource towards the girl child as they grow up. The girl child cannot be left behind alone after a certain age and the mother has to look after her due to safety reasons. This researcher came across mothers complaining that they had to leave job as there was no one to take care of their grown up daughter; even in urban affluent societies. So not to speak about the rural and poor societies. Thus girl child at the first instance will be viewed as additional expenditure to the family. It is also felt that the family has to make a lot of adjustments to suit the requirements of the girl child. But not so in the case of male child.

In India, particularly in the northwestern regions, there is a strong preference for sons for various reasons including religious and economic ones. It is argued that the well-established preference for male progeny combined with an emerging preference for small families has resulted in a loss of girls either before or after birth. Some writers state that a man 'experiences an affirmation of his masculinity in the birth of a son', especially because in the Hindu religion a man's salvation comes through his son. In addition, in the

northwestern regions, sons are considered economically advantageous for a family. They have a much higher rate of employment than girls thereby benefiting their families through their wages.⁴⁰ In India, for historical and economic reasons, a girl is still considered to be a burden on the family, while a boy holds out better promises for the parent's later period of life. Apart from the economic assistance to the family, the sons bring in a dowry at the time of their marriage through their wife and often continue to live in the home with their parents and help them in sickness and infirmity.⁴¹

While the birth of a son is beneficial to a family for many reason birth of a daughter is not. Possibly the biggest problem with a daughter is marriage cost predominantly of a dowry. If the first birth is female, the next pregnancy has diminished chances to complete full terms of pregnancy if the foetus is female. The parents of poor and middle-class families who cannot offered cost of marriage (including dowry) prefer to have recourse to sex test. If the female foetus is detected, an abortion is preferred. While dowry factor contribute to the viability of girl child, it is not the only factor responsible for female foeticide. Another significant factor is the economic contribution made to the family by a woman through her participation in the workforce. Millar finds a correlation between female labour participation rates and juvenile sex ratio India. Where female labour participation is high (as in some southern states) there is always a high preservation of female life and where female participation is low (as in north India) female children may or may not be preserved.⁴²

As indicated earlier, in the 2001 Census child sex ratio has declined States and Union-territories except in Kerala (5 points increase).

⁴⁰ Kuar, Singh and Dubey, "*Growing up in Rural India: Problems and Needs of Adolescent Girls*" Advent, New York, 1990

⁴¹ Singh J.P, op.cited p.110

⁴² Babara Miller : Ibid

Sikkim (2 points increase) Tripura (8 points increase) and Mizoram (2 points increase). In these states women play more active role in productivity and their participation in labour force is high as compared to northwestern regions. Southern states comparatively represent the low female foeticide rates than the northern states. In South India, the main form of agriculture is rice cultivation, which is labour oriented. There are lower percentage of land owing families which means that there are more opportunities for women to work in the field along with men and the families rely more heavily on the extra money that is brought to the family by these women. In contrast, in the northern regions, there is a higher cultivation, which is less labour intensive than the method used in the south. In northwestern regions there is significantly less participation of women in the labour force and consequently the worth of a women in an economic capacity is much less than that of a man. Thus the status of women coupled with their economic contribution to the family income has a direct link with the preservation of female life in India. The female foeticide which may be considered as an updated version of female infanticide is being practiced to a greater or lesser degree not only in India but also in South Korea, China, Hong Kong and other South East Asian Countries also. ⁴³

A major Indian strategy to control the abuse of pre-natal diagnosis and related female foeticide has been legal prohibition. To combat with the probe of female foeticide, several suggestions have come from the side of social scientists, legal scholars and women activists. In this regard the suggestions of Barbara Miller has a remarkable value. Miller has suggested a devise, as to which, a system of financial penalties and incentives can be introduced. According to this model, it would be more appropriate to make having son

⁴³ Dias, "Amniocentesis and female foeticide" Bulletin of the Indian Federation of Medical Guilds, July 1988 p.56

expensive through levying a 'son tax' fixed according to income. This researcher subscribes to the view of awarding incentives and measures like free ration for all minor females and educational allowances etc. But levying of penalty or 'son tax' are unworkable solutions.

In Indian society, usually the father holds the primary responsibility in the family for all practical purposes. The hard realities of life within the society in relation to the family are to be tackled by the male members. So the above said economic reasons like poverty, dowry etc. are ultimately the worry of the males. So it is quite natural that the male members; especially the husband would make up a mindset against the birth of female children and they will prevail upon the females and force the mother to go for abortion.

This poses another question as to the right of female over herself. The right to self esteem, right to her body, right to select her offspring, her reproductive rights etc are not recognized by the society. She has to act as per the dictates of the husband and the relatives.

Table No: 12 : Inter relation between female foeticide and factors like dowry, male preference and pressure from relatives (percentage-wise)

Factor	Urban	Rural	Semi-urban
Dowry	22	35	18
Poverty	13	27	21
Pressure	26	34	14

(Source : www.datamationfoundation.org.in)

The stigma attached to the women and the related insecurity is another factor. It is very difficult for the females to live an independent life and remain unmarried. The society feels that the

female is solely dependent upon the male and every female shall be bound to some or the other males. Even most of the average females in India consider marriage as their ultimate purpose. The mindset of males and their approach towards females are also relevant at this point. An average Indian female is always at the threat of exploitation and outrage, be it at the school where she attends, the office where she works, the bus or train where she travels, the family where she lives, the surroundings and everywhere she exists. This phenomenon drives her to seek the consortium of males throughout her life. Probably this may be context where the controversial reference in the Manu Smruthi become relevant.

*“...Pitha rakshantu balye
Bhartru rakshantu youvane
Puthru rakshantu vardhayakye
Na Shtree Swathanthramarhathi....”*

- Manusmruthi

The origin of the Indian idea of appropriate female behaviour can be traced down by Manu in 200 B.C.⁴⁴

The illiteracy among the women is one of the major factors. The women shall be aware of herself and her own rights.

It has been concluded in various studies that a woman is not conscious of her own identity, which is an indispensable for progress. She is unable to recognize her role in resolving her problems because of the prevalence of systems like dowry etc. The mind set of girls and women are shaped by cultural and institutional notions of themselves as inferior citizens, and the girl child as a second class commodity. On that background women themselves decide against

bringing girls into the world to endure the cruel existence imposed by a strong patrilinear society. The murder of girl foetus is justified as means of avoiding the extravagant overheads of a daughter's wedding and dowry. While the procedures may vary, the dowry system prevails in all communities. Marriage expenses vary depending on the community and the economic condition of the family.

Those women who undergo sex-determination tests and abort on knowing that the foetus is female are actively taking a decision against equality and the right to life. It is prevalent among top economic groups particularly in urban areas as compared to rural areas because of easy accessibility sex-determination technologies. Wherever the latest technologies have not reached there is no decline in the sex ratio.

3.9 Ill effect of Female Foeticide

Female foeticide cannot be viewed in isolation. It has to be viewed in the greater context of gender discrimination and atrocities against women. As a crime against society it has a number of adverse effects upon the society. It can be broadly summarized as follows:

1. As a device of selective reproduction it will seriously upset the demographic balance in the society and after a point of time, the number of females in the society will be very few compared to that of male and consequently the society will be male dominated.
2. It will result in decline of values in the life, and over all social degradation; which in turn will promote social evils like corruption, malpractice etc.

⁴⁴ Chandra Ramesh, *Social Department in India Volume 5 – Women and Child Department*, Delhi: Isha Books, 2004, p.28.

3. The lesser number of women will cause a social pressure to produce more children, which would endanger the physical and mental health of the females.
4. On account of repeated pregnancies, morbidity and mortality of women will increase which will further reduce the number of women in the society.
5. The reduced sex ratio will result in the fewer number of marriageable women and the institution of 'polyandry' will resurface and that would lead to tension in families and later on in the society.
6. It would result in loose moral values.
7. Low female sex ratio will generate sexual starvation among the males and it will help to flourish the business of prostitution and immoral trafficking. The increase in prostitution will lead to spread of venereal diseases and would pose serious problems like spread of AIDS etc and ultimately the health of the society will be spoiled.
8. Reduced sex ratio will lead to increase in crime against women like rape, kidnapping etc. and will upset the sense of safety in public. Recently the Times of India daily has come out with a report on increase in crime against women in 'Mumbai', which was considered to be the most free and safe city for women in India. The reason mainly attributed to it was the large-scale migration of bachelor males to Mumbai during the last decade.

9. Women will not be permitted to go out of their houses on account of increased crimes against them and consequently they will be deprived of better education, employment opportunities and economic freedom.
10. Continued practice of female foeticide will give rise to emergence of black market in service and medical profession.
11. The ethical standard of medical profession will be given a go by which will affect every branch of the profession and will lead to inflated fees.

Dr. J.D. Singh., Prof. Head and Dean, Institute of Law, Bundelkhand University, Jhansi is of the opinion that if within five years female foeticide is not curbed then the situation will be very different. Males will be more as compared to females. Reverse dowry will be started and females may choose their life partners by 'Swayamvar'. Males out numbering females will upset the demographic balance in the society⁴⁵.

Female foeticide is just one facet of the vast anti-women behavioural spectrum in India. Tackling this menace require a multifaceted action programme along with the revolutionary change in the mindset. First we have to accept a foetus as a life itself and recognize the human rights and right to life of a foetus at par with that of a living person.

⁴⁵ (Lecture delivered in the workshop organized by 'Valsalya' on 10.03.2002)

3.10 Foetus Rights As Human Rights

The Universal Declaration of Human Rights was the first major international human rights instruments to explicitly recognize economic, social and cultural rights. The canon has been extended to provide explicit protection for group rights, such as, the right of self-determination, right of indigenous peoples, and for the groups that are specially vulnerable such as children, the elderly, the disable and refugees. Human rights may be usefully defined as universal, moral rights, which all persons possess inherently and equally because they are human beings.

The traditional natural law theory of rights that has come down to us from the stoics, medieval Christian theology, and the Enlightenment, by and large upheld the view that rights are natural. On this account natural or human rights exist as moral laws, only post-modernist criticism received by modern human rights conception about its universality is that, its only an expression of North Atlantic bourgeoisie⁴⁶ intellect community with its cultural ethos, especially the white male, who have confounded their ideology to all societies, in a genderless way. Sexual discrimination is not separately emphasized, although it could be argued that it is the most common world-wide discrimination. Women are often given less to eat than men in certain civilization where food is short, they may receive less medical attention, and in some cases, 'infant female' infanticide has been practiced. Female foeticide is the modern substitute for infanticide.

With the decline in family authority and human values the sense of right and wrong is easily submerged by the pressure exerted by competition, race for material success and above all the cult of

individual freedom, even at the cost of social and familial cohesion. This being a deep malaise is the root of social collapse.⁴⁷

It is a well-known fact that the age of the child is counted from the birth of the child. The unborn child is not included while defining person Indian Constitution of any other law.

Under the Hindu law, the presumption is that a child comes to existence at the time of its conception. Not only this, if a coparcener conceived at the time of partition but born afterwards has the right to get the partition reopened, Privy council in the case of *Tagore v . Tagore* observed that as general rule adopted in the jurisprudence, this class would include children in embryo, who afterwards came into existence as separate entity. A child in mother's womb is considered to be living entity within its own life. The constitutional protection of unborn children considers the imagined right of all foetuses to be born. Based on Law Commission report published in 1974, "Injuries to unborn children baring on congenial disabilities Act, 1976" was passed, which gives right to a child for cause of action or his personal injuries caused before its birth. Since abortion has been legalized under MTP Act on certain grounds subject to the length of the pregnancy. Now the question arises can an unborn child claim the right to life and liberty as enjoyed by other persons under Indian constitution. The fundamental rights provided under the Indian constitution are the counterparts of American constitution.

In the famous American cases of *Roe v. Wade*; *Doe v. Bolton*, it was argued that an unborn child is a person according to the 14th

⁴⁶ Iyer Arthi, *Women and Human Right*, Chennai: Periyar Publications, p.53.

⁴⁷ Ibid p.61

Amendment of the constitution of United States, hence, it cannot be deprived of its life without the due process of law. But in both the cases Supreme Court observed that unborn child is not a person under the 14th Amendment of the constitution of United States Life commences at the moment of conception and continues throughout pregnancy, hence the state has compelling interest in saving the life, from and after its conception, but we are not to resolve the difficult question that when it commences. When the persons expert in their respective fields of medicine, philosophy and theology are unable to arrive at a definite conclusion. The judiciary at this juncture in the development of man's knowledge is not in a position to form an opinion as answer.⁴⁸ However in *Roe V Wade* the right to a women to choose whether or not to terminate pregnancy was recognized as fundamental.⁴⁹

In many cases, of course, the women are not independent agents but merely victims of a dominant family ideology based on preference of male child. On one hand, the motherland and mother are treated as an embodiment of paradise in our country but on the other hand female foeticide has become a general phenomenon, which is a matter of shame to all of us. Millions of people refer male progeny and considered bearing sons as essential to extend the lineage. In the bargain thousands of female fetuses are aborted. A proper education will create an awareness of self-esteem and enlighten them of their own rights. Then they will be able to stand on their foot and raise their voice against this so-called general phenomenon.

American convention on Human Rights (1969) states under its Chapter II Article 4 (Right to life) "Every person has the right to have his life respected. This right shall be protected by law and, in

⁴⁸ Paul R.C, *Protection of Human Rights*, New Delhi : Common Wealth Publications, 2001 p.23.

⁴⁹ Ibid p.25

general, from the moment of conception. No one shall be arbitrarily deprived of his life.”⁵⁰ Here the right to life is extended so as to cover the foetus rights also.

The Constitution of Ireland also recognises similar rights as part of their personal rights: It says “The state acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and as far as practicable, by its laws defend and vindicate that rights.”⁵¹

3.11 Unborn Child and UN Convention on the Rights of Child

Neither the UN Conventions on the Rights of Child, 1989 nor the World Declaration on the Survival, Protection and the Development of Children and the Plan of Action for Implementing it, adopted on 30th September, 1990 by 71 heads of the states and 88 others have any provision for the protection of the unborn child. Though in the preamble of the 1989 Convention it is said “the child Needs special safeguards and care, including appropriate legal protection, before as well as after birth”, yet the definition of the word “child” completely excludes the unborn child from its scope. The same is held in Article 24 of the Universal Declaration of Human Rights. The Convention defines the “child” meaning every human below 18 years of age unless under the law child is attained majority is attained earlier. Therefore, the Convention exclusively applied to the child after it has been born.

⁵⁰ Fitzsimmons, Richard, *Pro-Choice / Pro-life issues in the 1990s*. Westpat : Conn. Greenwood, 1996.

⁵¹ Art : 40 of constitution of Ireland.

3.12 Legal Paradox in India

The Constitution of India has recognized the Right to life vide Article 21 has also recognized the in several cases (as in *Menaka Gandhi v. Union of India*⁵² and *Francis Corelli*⁵³). There is no express Fundamental Right to be born though we can interpret it under Article - 21. But this is hardly available to the unwanted girl child. Though the right of the girl child as may be interpreted from Article 21 of the Constitution may be interpreted in broader terms and should be inferred as: (1) Right to be born and not to be aborted only because she is a girl; (2) Right to remain alive after birth and not to be killed at any moment after birth; and (3) Right of the girl child to her mind, her body, right to childhood and right to a healthy family environment, which she is not in a position to withstand. Thus can the act of the mother be “excused” or “justified” under criminal law? This may be compared to the case of ‘superior order’, where one acting under the order of a superior has committed a crime, and he is not in a position to exercise his own choice, he is not liable to punishment (as is in the case of soldiers acting under orders). However, the question arises whether societal or familial pressure can be construed as ‘superior order’? There is an opinion that it would be stretching the definition of superior order much too far, as every crime is usually committed under social pressure as ‘a criminal is not born but is created by society’. Therefore although it is unfair to punish the mother as she rarely has a choice, there exists no basis for excusing her under criminal law or legal theory.

The next question that arises is whether the husband or relatives can be punished?

⁵² AIR 1978 SC 597

⁵³ AIR 1981 SC 746

The husband and relatives are usually involved in the very commission of the offence, and therefore liable to be punished under the law. In the alternative, they may be made liable for abetment of the offence. However, as we have already seen, this is rarely done and it is usually the mother who is punished.

Therefore although the law may not be very effective due to the very nature of the crime, its existence is extremely important to serve as a deterrent and to provide a moral norm. However, criminal law needs to be supplemented by a more holistic approach to try and tackle the problem from its roots, by seeking to eliminate the causes of female infanticide. Sec.299 of Indian Penal Code does not recognize killing a child in the womb as culpable homicide. Thus the crime of female foeticide does not attract severe punishment as compared to homicide.⁵⁴

In order to overcome these problems it is suggested that there needs to be an amendment in the law. First, we need to recognize female foeticide as a separate crime and then deal with complexities involved.

There should be a definition of the crime of female foeticide.

On account of the difficulties faced in proving that the abortion took place under unpermitted conditions the burden of proof shall be shifted to the defence, as is done in the case of dowry deaths where there is a presumption of a dowry death in case the woman dies within seven years of marriage⁵⁵. It is suggested that whenever there

⁵⁴ Mishra, *Crimes Against Unborn Child; Child victims of Crimes Problems and Perspectives*; Gupta M.C. New Delhi; Gyan Publishing House, 2000, p.93.

⁵⁵ Sec : 304 B -IPC

is an abortion of female foetus there is a presumption of a case of

female foeticide and the burden lies on the family to disprove it. The failure on the part of husband and relatives must be construed as abetment.

Since, the crime is usually not reported, not only must there be a strict enforcement of mandatory registration genetic centres, but also, a mechanism must be devised whereby vigilance is localized.

What is also important is that apart from merely penalizing the crime of female foeticide, the law should also seek to prevent it. Although penalty serves such a purpose it does so in a very limited manner by merely serving as a deterrent. It is also important to tackle the problem from its roots and causes as was done by the local British administrators and the Special Act of 1870 in the case of female infanticide. It needs to be undertaken as a policy measure by the legislature and not on the whims and fancies of changing governments.

3.13 Schemes to Battle Female Foeticide

If viewed in the larger context of gender discrimination in society, female foeticide, though an extreme form of gender violence, can be said to have originated from such discrimination. Thus it becomes important to intervene at both short-term and long-term policy levels. The first would obviously be directed at dealing with the immediate problem of female foeticide, while the latter would aim to strike at the apparent causes of the problem. Promoting gender equality through education and awareness-building are as critical in the eradication of the practice as any direct action plans. Prof. Ramesh Chandra says

that promoting gender equality signifies promoting opportunities for women-economic social and political and reducing gender inequality.⁵⁶

The SAARC nations declared 1990 as the Year of the Girl Child, and the next decades 'the SAARC decade of the girl child'. Thus the Government of India developed a national plan of action for the girl child for 1991-2000 to enforce the rights of the girl child. The plan primarily aims towards:⁵⁷

- ◆ Preventing female foeticide and infanticide by banning the practice of amniocentesis for sex determination;
- ◆ Ending gender disparity in infant mortality rate;
- ◆ Eliminating gender disparities in feeding practices, expanding nutritional interventions to reduce severe malnutrition by half, and provide supplementary nutrition to adolescent girls;
- ◆ Providing relief for girls who are economically and socially deprived and belong to special groups;
- ◆ Intervening to sensitize various agencies on the need to protect the girl child and adolescent girls from exploitation, assault, and physical abuse;
- ◆ One percent reservation in jobs for the 'cradle babies' as a provision for when they grow up.

However, and though the government claims otherwise, the scheme has not been successful. The one most important factor seems to be the poor implementation of the scheme and the apparent neglect

⁵⁶ Chandra Ramesh, *Social Development in India Rural Development*, Volume I, Delhi Isha Books, 2004 p.275.

⁵⁷ www.countercurrents.org

of the abandoned children. Statistics show that out of 133 children received 70 died due to neglect (unofficial figures put the number of deaths at an even higher figure). It is commonly believed that the babies abandoned in the cradles placed outside the shelters at night were often left unattended through the night resulting in their death by morning thus the shelters are not considered a viable option by people. Mothers have often expressed fears that their girls could be used for begging, prostitution and domestic work, and therefore prefer to kill them, rather than having them exploited. The state however seems to be oblivious to this is as evident from a statement of a social welfare minister in Tamil Nadu, who believed that the reason for the low number of babies received at the centres was because the scheme had successfully created awareness among the people.

Also, the schemes were not very well-published and studies showed that even in areas where female infanticide was rampant, the people were unaware of the existence of the scheme.⁵⁸

A second scheme initiated by the Tamil Nadu government involves an incentive of Rs.5000 to be invested in the name of 1 of 2 girls if the couple has only two girls and no sons, and if one of the parents agrees to undergo sterilization, provided that the family is below the poverty line. The investment made in the name of the girl child would be given to her when she becomes 20. However even this scheme has not been very well received because the incentives are not immediate, and therefore do not hold any real charm.

⁵⁸ Report: *Child Welfare Society*, Government of Tamil Nadu 2001.

In terms of long term policy measures, the Tamil Nadu government has formulated various plans of action under the Vision 2000 programme.

The Tamil Nadu Integrated Nutrition Programme is one such plan introduced by the government, which looks after the health of the pregnant women. There are three persons for every population of a thousand to look after the nutritional and health care needs of pregnant women thus making it difficult for a female infanticide to take place without its coming to the notice of these workers.⁵⁹

The government has also initiated some campaigns to educate people and to raise the status of women, through employment schemes. Also, land *pattas* are issued only in the name of women to provide them security.

3.14 Supreme Court on Female Foeticide

The Supreme Court of India has addressed this problem with all its seriousness and delivered a landmark judgement in 2001. As in the case of many other human rights issues the Supreme Court has rose to the occasion and issued some meaningful directions to Central and State Governments. Considering the importance of judgement as the solitary pronouncement of apex court on this topic the text of the order as reported in Centre for Enquiry into Health and Allied Themes (CEHAT) vs Union of India⁶⁰ is reproduced hereunder.

⁵⁹ Info. Brouchre: Department of Public Relations, Government of Tamil Nadu, 2003

⁶⁰ AIR, 2001. SC 2007

ORDER: - It is unfortunate that for one reason or the other, the practice of female infanticide still prevails despite the fact that gentle touch of a daughter and her voice has soothing effect on the parents. One of the reasons may be the marriage problems faced by the parents coupled with the dowry demand by the so-called educated and / or rich persons who are well placed in the society. The traditional system of female infanticide whereby female baby was done away with after birth by poisoning or letting her choke on husk continues in a different form by taking advantage of advance medical techniques. Unfortunately, developed medical science is misused to get rid of a girl child before birth. Knowing full well that it is immoral and unethical as well as it may amount to an offence, foetus of a girl child is aborted by qualified and unqualified doctors or compounders. This has affected overall sex ratio in various States where female infanticide is prevailing without any hindrance. (Emphasize supplied by the researcher).

2. For controlling the situation, the parliament in its wisdom enacted the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (hereinafter referred to as "the PNDT Act"). The Preamble, inter alia, provides that the object of the Act is to prevent the misuse of such techniques for the purpose of pre-natal sex determination leading to female foeticide and for matters connected therewith or incidental thereto. The Act came into force from 1st January, 1996.
3. It is apparent that to a large extent, the PNDT Act is not implemented by the Central Government or by the State Government. Hence, the petitioners are required to approach this Court under Article 32 of the Constitution of India. One of the petitioners is the Centre for Enquiry into Health and Allied Themes (CEHAT) which is a research center of Anusandhan Trust based in Pune and Mumbai. Second petitioner is Mahila Sarvangeen Utkarsh Mandal (MASUM) based in Pune;

Maharashtra and the third petitioner is Dr. Sabu M Georges who is having experience and technical knowledge in the field. After filing of this petition this Court issued notices to the concerned parties on 9.5.2000. It took nearly one year for the various States to file their affidavits in reply / written submissions. Prima facie it appears that despite the PNDT Act being enacted by the Parliament five years back, neither the State Governments nor the Central Government has taken appropriate actions for its implementation. Hence, after considering the respective submissions made at the time of hearing of this matter, as suggested by the learned Attorney General for India, Mr. Soli J. Sorabjee following directions are issued on the basis of various provisions for the proper implementation of the PNDT Act:-

I. Directions to the Central Government:

1. The Central Government is directed to create public awareness against the practice of pre-natal determination of sex and female foeticide through appropriate releases/programmes in the electronic media. This shall also be done by Central Supervisory Board ("CSB" for short) as provided under Section 16(iii) of the PNDT Act.
2. The Central Government is directed to implement with all vigor and zeal the PNDT Act and the Rules framed in 1996. Rule 15 provides that the intervening period between two meetings of the Advisory Committees constituted under sub-section (5) of Section 17 of the PNDT Act to advise the appropriate authority shall not exceed 60 days. It would be seen that this Rule is strictly adhered to.

II. Directions to the Central Supervisory Board (CSB)

1. Meetings of the CSB will be held at least once in six months.
(Ref. Proviso to Section 9(1)). The constitution of the CSB is

provided under Section 7. It empowers the Central Government to appoint ten members under Section 7 (2) (e) which include eminent medical practitioners including eminent social scientists and representatives of women welfare organizations. We hope that this power will be exercised so as to include those persons who can genuinely spare some time for implementation of the Act.

2. The CSB shall review and monitor the implementation of the Act. [Re. Section 16(ii).]
3. The CSB shall issue directions to all State/ UT Appropriate Authorities to furnish quarterly returns to the CSB giving a report on the implementation and working of the Act. These returns should inter alia contain specific information about:-
 - (a) Survey of bodies specified in Section 3 of the Act.
 - ~~(b) Registration of bodies specified in Section 3 of the Act.~~
 - (c) Action taken against non-registered bodies operating in violation of Section 3 of the Act, inclusive of search and seizure of records.
 - (d) Complaints received by the Appropriate Authorities under the Act and action taken pursuant thereto.
 - (e) Number and nature of awareness campaigns conducted and results, flowing therefrom.
 - (f) The CSB shall examine the necessity to amend the Act keeping in mind emerging technologies and difficulties encountered in implementation of the Act and to make recommendations to the Central Government. [Re. Section 16]
4. The CSB shall lay down a code of conduct under Section 16 [iv] of the Act to be observed by persons working in bodies

specified therein and to ensure its publication so that public at large can know about it.

5. The CSB will require medical professional bodies/associations to create awareness against the practice of pre-natal determination of sex and female foeticide and to ensure implementation of the Act.

III. Directions to State Government/UT Administrations:

1. All State Government / UT Administrations are directed to appoint by notification, fully empowered Appropriate Authorities at district and sub-district levels and also Advisory Committees to aid and advise the Appropriate Authority in discharge of its functions (Re. Section 17(5)). For the Advisory Committee also, it is hoped that members of the said Committee as provided under Section 17(6)(d) should be such persons who can devote some time for the work assigned to them.
2. All State Government/UT Administrative are directed to publish a list of the Appropriate Authorities in the print and electronic media in its respective State/UT.
3. All State Government/UT Administrations are directed to create public awareness against the practice of pre-natal determination of sex and female foeticide through advertisement in the print and electronic media by hoardings and other appropriate means.
4. All State Government/UT Administrations are directed to ensure that all State/UT Appropriate Authorities furnish quarterly returns to the CSB giving a report on the implementation and working of the Act. These returns should inter alia contain specific information about:-
 - (a) Survey of bodies specified in Section 3 of the Act.

- (b) Registration of bodies specified in Section 3 of the Act.
- (c) Action taken against non-registered bodies operating in violation of Section 3 of the Act, inclusive of search and seizure of records.
- (d) Complaints received by the Appropriate Authorities under the Act and action taken pursuant thereto.
- (e) Number and nature of awareness campaigns conducted and results flowing therefrom.

IV . Directions to Appropriate Authorities:

1. Appropriate Authorities are directed to take prompt action against any person or body who issues or causes to be issued any advertisement in violation of Section 22 of the Act.
2. Appropriate Authorities are directed to take prompt action against all bodies specified in Section 3 of the Act as also against persons who are operating without a valid certificate of registration under the Act.
3. All State/UT Appropriate Authorities are directed to furnish quarterly returns to the CSB giving a report on the implementation and working of the Act. These returns should inter alia contain specific information about:-
 - (a) Survey of bodies specified in Section 3 of the Act.
 - (b) Registration of bodies specified in Section 3 of the Act including bodies using ultrasound machines.
 - (c) Action taken against non-registered bodies operating in violation of Section 3 of the Act, inclusive of search and seizure of records.
 - (d) Complaints received by the Appropriate Authorities under the Act and action taken pursuant thereto.

(e) Number and nature of awareness campaigns conducted and results flowing therefrom.

4. The CSB and the State Government/Union Territories are directed to report to this Court on or before 30th July 2001. List the matter on 06.08.2001 for further directions at the bottom of the list.

While the Judiciary has expressed deep concern about the seriousness of the problem, the Legislature has also contributed a lot towards the eradication of this problem. The Parliament has enacted numerous laws to eradicate gender bias and discrimination against women; in the line of constitutional protection to women against gender injustice.

The global instruments on Human Rights related to women and children have been emphasizing on protection of human rights of women which included right to equality before law, right against gender discrimination, right against harassment, right to abortion, right to Privacy and the right to economic empowerment. The year 2001 was celebrated as the year of Women Empowerment.⁶¹

In recent years, fight against female infanticide and female foeticide started gaining momentum as a human rights in India along with many other parts of the world.

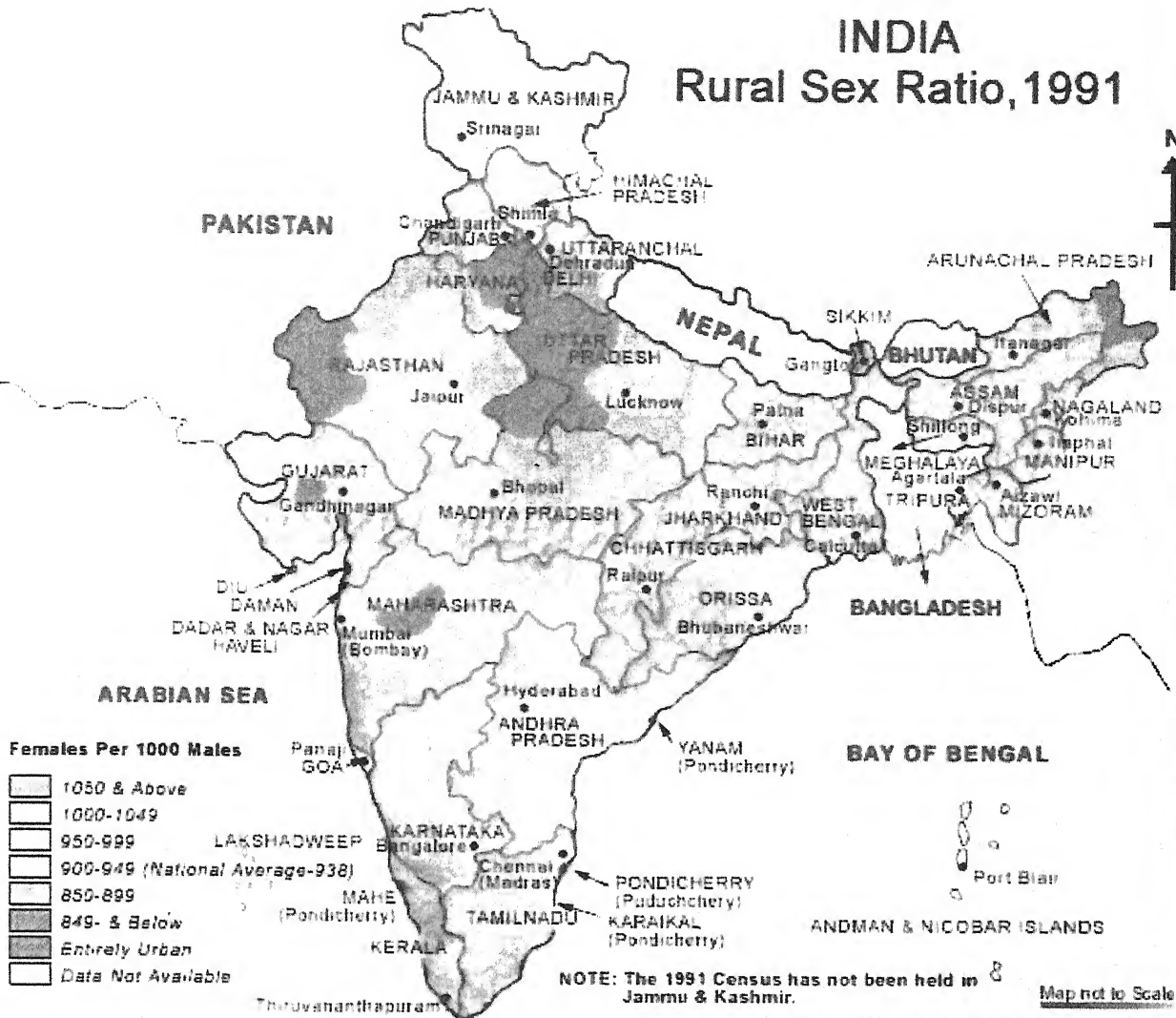
3.15 Maps Showing Geographical Distribution

The following maps show the geographical distribution of sex ratio as per the 1991 and 2001 census.

⁶¹ Paranjape, N, *Criminology and Penology*, Allahabad : Central Law Publications, 2001, p.125.

INDIA

Rural Sex Ratio, 1991



INDIA

Urban Sex Ratio, 1991

Page

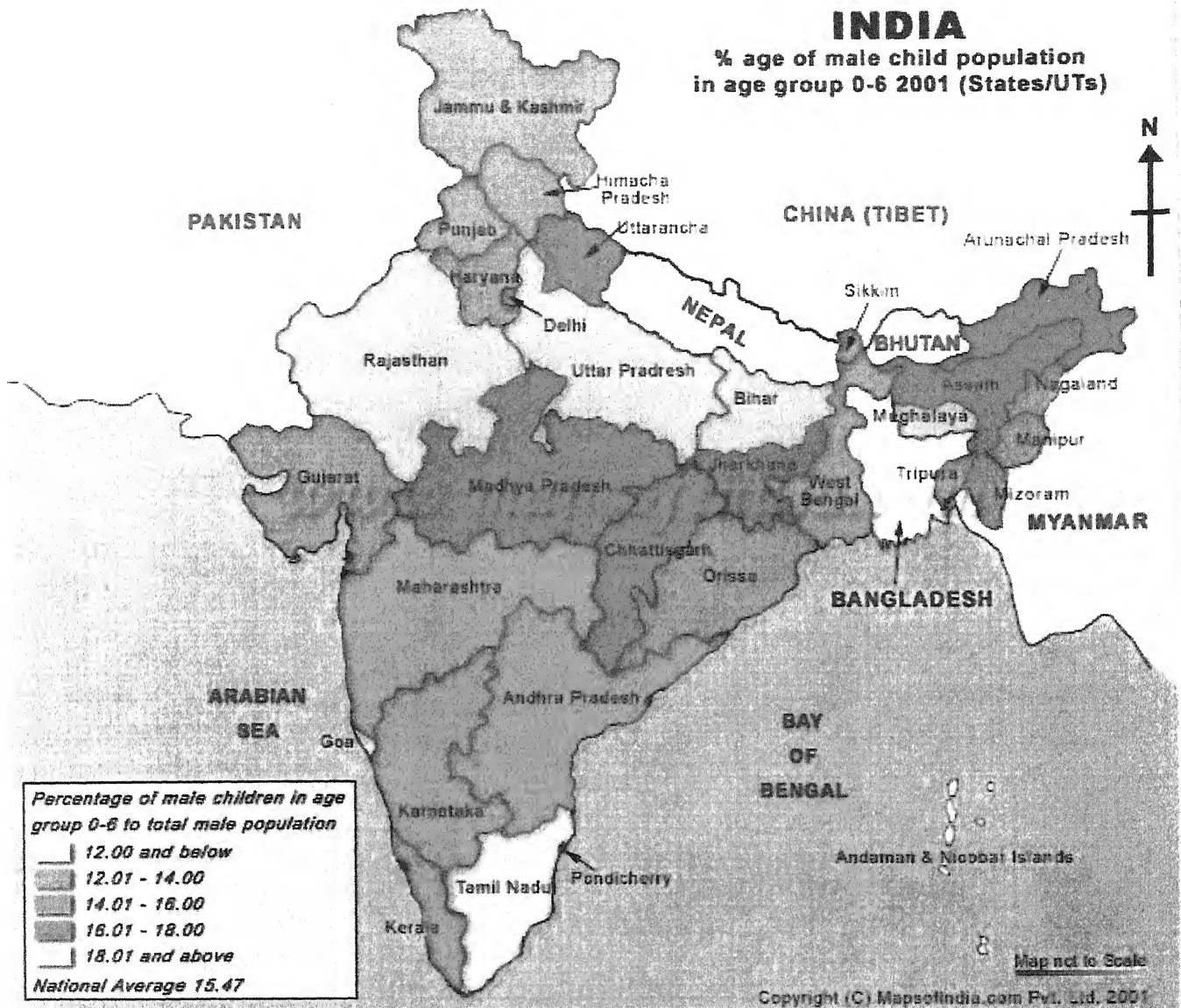


Sex Ratio Map of India - 2001



INDIA

% age of male child population
in age group 0-6 2001 (States/UTs)



CHAPTER - IV

FEMALE FOETICIDE - MEDICO LEGAL ASPECTS

CHAPTER – IV

FEMALE FOETICIDE – MEDICO LEGAL ASPECTS

Development in science has opened new vistas of knowledge and technological advancement, has made the life of human being more comfortable. Since the end of Second World War, infant and child death rates have considerably reduced, average life expectancy has increased and the percentage of rural families with access of safe water and health services has increased. As medicine advances, new techniques were devised for preventing the genetic chromosomal disorders of the child in the womb. With these techniques and machinery it became possible to ascertain the sex of the child in the womb even at very early stages of pregnancy with almost cent percent accuracy.

4.1 DIFFERENCE TECHNIQUES OF SEX DETERMINATION:¹

Difference Methods used to know the pre-natal abnormalities and sex of foetus are :

- (1) Chorion villous biopsy
- (2) Aminiocentesis
- (3) Ultrasonography

It would be better to have a quick look at the medical and clinical of these methods before going to the legal aspects.

¹ Info: Brochure, Stella Maris College, Chennai: on Female Foeticide Issues and Concerns.

CHORION VILLIOUS BIOPSY:

This test can be performed in the first 7-11 weeks of pregnancy. A plastic canula is passed through the cervix upto amniotic sac and a few chorionic cells, which occur at the site of future placenta, surrounding the sac, are aspirated under ultrasound vision. These cells are cultured in a specific solution. This technique is used to diagnose some inherited diseases such as thalassaemia, cystic fibrosis and muscular dystrophy etc. these disease affect tissues and organs, which develop after the first few weeks. It is also possible to diagnose the congenital defects in an unborn foetus.

AMINOCENTESIS:

Aminocentesis is the oldest procedure for pre-natal diagnosis. It has been in use for over 100 years. By this test certain genetic defects and sex of the unborn baby can be determined. It is a procedure in which 15-20ml of amniotic fluid is taken out. The genetic disease or defect can be ascertained or analysed by chromosomal studies. The process can be performed between 14 to 16 weeks of pregnancy and has nearly 1-2 per cent risk of abortion.

For accurate determination of the sex of the foetus, the cells have to be cultured for 3 weeks, else inaccuracy rate is 10-20 percent. It is useful tool to detect fetal abnormalities such as mongolism, haemophilla, retarded muscular growth, Rh incompatibility and other gender related disorders. This test is normally used for women after 35 years of age when the incidence of Down's Syndrome babies and deformed children increase.

ULTRASONOGRAPHY:

It is the most commonly used test in the modern times. It is an imaging technology where the image or photograph of an organ or tissue is obtained by using ultrasound. This technology uses the

'echo' of sound waves to visualize the form of the fetus in the womb as early as from 11 to 14 weeks after conception. Through this method it is possible to diagnose 50 percent of the abnormalities related to the central nervous system. This technology gained immense popularity in India, to determine the sex of the foetus. If the foetus is female, an abortion is carried out.

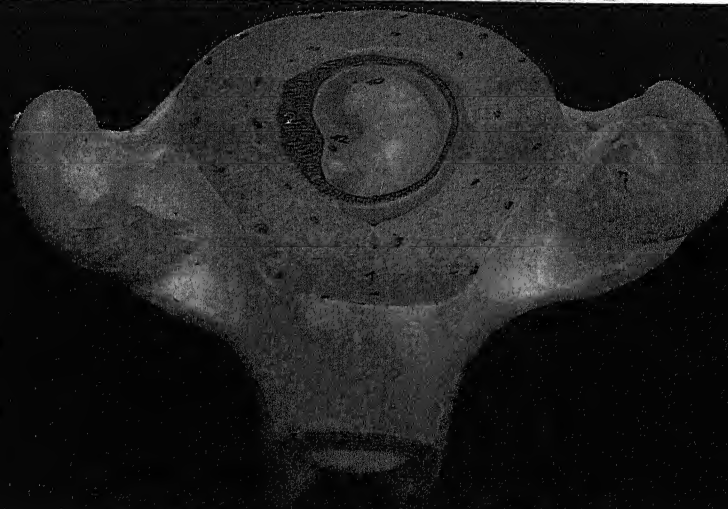
The chance of accurate prediction is 95 to 96 percent in this test, depending upon the expertise of the ultrasonologist. As pregnancy advances, the chances of accuracy also increases.

Although these tests are meant to diagnose possible hereditary diseases and congenital defects in a foetus, in today's scenario these technologies are largely used to know the sex of an unborn child. Out of malafide intentions, the accuracy date of such tests at that particular point of time is not explained to the victim. These tests have certain complications and risks as bleeding, spontaneous abortion, introduction of a infection and anaemia. Bu the irony of the situation is that these complications are hardly ever explained to the couple or if explained the victim overlooks them.²

² Sharma Sanjaya, *Associate Prof. Medical College, Jhansi* : on 'Female Foeticide and its various critical aspects' – workshop report held on 10th March 2002, p.6



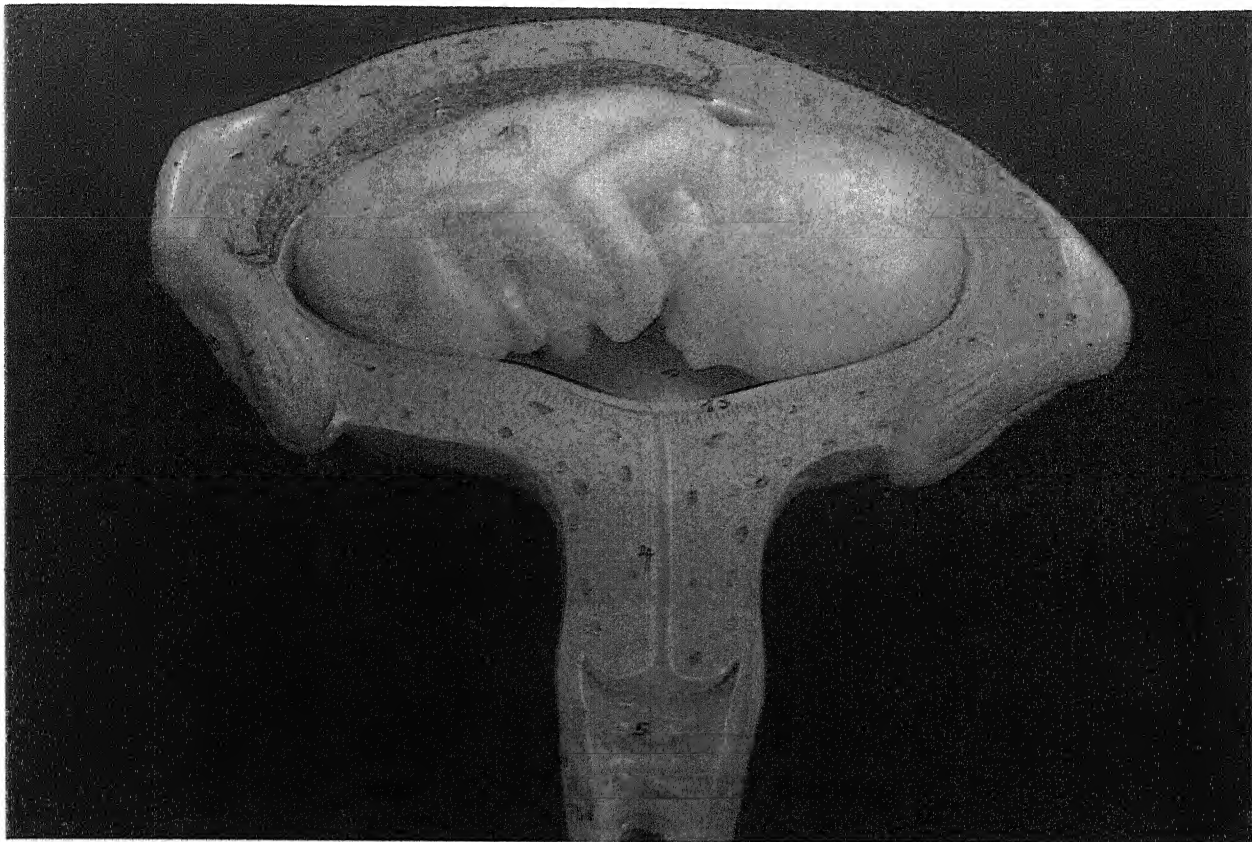
FOUR WEEKS FETUS



EIGHT WEEKS FETUS



TWELVE WEEKS FETUS



SIXTEEN WEEKS FETUS



EIGHTEEN WEEKS FETUS

4.2 Abortion and its Classifications:

Abortion or miscarriage means the spontaneous or induced termination of pregnancy before the foetus is independently viable, which is usually taken as occurring after the 28th week of conception.³ Dr. C.K. Parkh says abortion means the expulsion of the products of conception at any period of gestation before full term.⁴

Classification of Abortion:

Abortions are classified into two groups: viz.,

- i) those which occur naturally or spontaneously and are known as natural and
- ii) those which occur as a direct result of interference with the pregnancy, and are known as artificial.

Artificial abortions may be either

- a) legal or justifiable when performed accordance with legal provisions and
- b) Criminal when performed otherwise.⁵

Natural (Spontaneous) Abortion

The incidence of (spontaneous) abortion is 10% to 15% for all pregnancies. Abortions are most frequent within the first three months of pregnancy, owing to the slight attachment of the ovum to the uterine wall. Within the first few weeks, the ovum being very minute, is cast off without being recognised or abortion being

³ Modi's *Medical Jurisprudence and Toxicology*, Edited by Subramanyan B.V., New Delhi : Published by Butter Worths, 2001, p.581.

⁴ Parikh. C.K. - *Parikh's Text Book of Medical Jurisprudence Forensic Medicine and Toxicology*, New Delhi, BS Publishers and Distributors, 2000, p.56.

⁵ Ibid at p.5.70.

suspected. Women might go one or two weeks over their time and then often have what is supposed to be merely a more than usually profuse period. These are probably instances of such early spontaneous abortions.

The causes of spontaneous abortion are classified as those which are directly referable to the mother and which affect the foetus.

4.3 (i) Causes Directly Referable to the Mother:

- a) Actuate infections, such as pneumonia, typhoid and psyelonephritis occasionally lead to abortion, as also chronic wsting disease, for example, tuberculosis, cancer and hypertension.
- b) Disease affecting the blood, such as anemia, jaundice, and rhesus sensitively, ABO incompatibility is also known to cause abortion.
- c) Those acting through the nervous system for example, psychic trauma, sudden shock, fear, joy, sorrow, reflex action from irritation of the bladder, rectum or mammac.
- d) Abnormalities of reproductive organs.
- e) Physical trauma which separates the ovum.
- f) Lead, copper and mercury poisoning.

(ii) Causes Affecting the Foetus:

- a) Death of the foetus due to genetic abnormality, hormonal imbalance, syphilis, foetal anaemia and other disease.
- b) Diseases of decidua and fibrinoid necrosis.

Induced Abortion (Therapeutic)

This is also known as justifiable abortion, the induction of which is justifiable only when caused in good faith to save the life of the woman (Section 312 and 315 IPC) if it is materially endangered by the continuance of pregnancy, but not to save the family honour or for any other ethical or economic reason.⁶

4.4 DIFFERENT METHODS OF ABORTION:⁷

Although there are innumerable methods employed for procuring foeticide, but (Suction Evacuation), Dilatation and Curettage (D & C), and use of Hypertonic saline are commonly used in our country.

Methods employed depending upon their gestational age of the fetus:

During First Twelve Weeks:

- (i) Suction Evacuation
- (ii) Dilation & Curettage (D & C)
- (iii) Use of Prostaglandins

Between 12 to 20 weeks:

- (i) Use of Hypertonic saline or M-Cradle
- (ii) Use of Prostaglandins
- (iii) Use of Oxytocin
- (iv) Hysterotomy (Mini Caesarean)

⁶ Modi Op.cited p.581-583

⁷ Laurence.H. *Encyclopedia of Gynecology*, by Thomas Nelson Publishers: Ontario, U.S., 1999 p.p. 232-247

Suction Evacuation:

In this procedure, a plastic or a metal tube is introduced into the uterus and negative pressure is applied with the help of a suction machine and uterine contents are sucked out in pieces, through the tube.

Dilatation and Curettage (D & C):

Most commonly employed method when foeticide is being performed by Medical Professionals. In this procedure firstly the uterine opening is dilated with help of a dilator or Laminaria tent and their uterine contents are taken out in pieces after curettage with the help of a curette.

Use of Prostaglandins:

Prostaglandins when taken in form of tablet orally or in injection form or kept in the vaginal tract induces severe uterine contractions. Due to these untimely uterine contractions the placenta gets separated from the uterine wall leading to loss of blood supply to the foetus. As a result foetus dies, which is expelled out from the uterus.

Pregnancy Between 12 to 20 weeks:**Use of Hypertonic saline or M-cradle:**

In this method a long needle is inserted into the uterine cavity through abdominal wall and hypertonic saline or M-cradle is injected. Due to these the fetus dies in the womb and because of increase of uterine pressure the dead foetus is expelled out.

Use of Prostaglandins:

When pregnancy is above 12 weeks the topical application of prostaglandin E2 intravaginally in a viscous base is an effective, safe and highly acceptable method. The usual dose is 2.5 – 5 mg, which may be repeated after 6 – 8 hours if necessary. This induces severe contractions in the uterus because of which the placenta separates, fetus dies and is expelled out.

Use of Oxytocin:

The synthetic preparation (Syntocinon) is widely used as intravenous drip infusion. Oxytocin increases the intensity and frequency of uterine contractions and relaxation thereby leading to expulsion of the foetus.

Hysterotomy:

In this method fetus is taken out in the same way as it is taken out through cesarean operation. Uterus is opened through abdomen by incising it and foetus is evacuated out.⁸

4.5 IS ABORTION LEGAL OR ILLEGAL ? :

Abortion is illegal when it does not comply with the provisions, of the MTP Act, 1971.

The following are the indications under which termination of pregnancy is legally allowed under MTP Act.⁹

⁸ Tribe, *Abortion, The last of absolutes*, Washington : C.Q. Press, 1998 p.p.364-382

⁹ Agarwal Nomita, *Women and Law in India Current Legal issues*, Delhi : New Century Publications 2002, p.203.

- a) **Therapeutic indications** : In order to prevent injury to the physical or mental health of the pregnant women.
- b) **Eugenic indications** : In view of the substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.
- c) **Humanitarian indications** : As the pregnancy is alleged by a pregnant woman to have been caused by rape.
- d) **Social indications** : As the pregnancy has occurred as a result of failure of any contraceptive device or method used by a married woman or her husband for the purpose of limiting the number of children.
- e) **Environmental indications** : In order to prevent a risk of injury to the physical or mental health of the pregnant women which may arise by reason of her actual reasonably foreseeable environment.

4.6 COMPLICATIONS OF MTP AND EVIDENCE OF ABORTION ¹⁰

Complications of MTP :

- a) Immediate Cause
- Haemorrhage and Shock.
 - Perforation of uterus and bowel.

- Cervical Laceration.
- Incomplete abortion.
- Endometritis and thrombophle bitis etc.

b) Delayed Complications

- Menstrual disturbances.
- Sterility
- Abortion and Premature labour.
- Rh isoimmunisation.
- Psychological Sequeale¹¹

Any abortion, which does not come under the rules of the MTP Act, although performed by qualified doctors, comes under criminal abortion, and the doctors are liable for prosecution and punishment.

Evidence of Abortion :

The evidence of abortion can be determined by examining.

- 1: the woman alleged to have aborted, and
2. the aborted material if available.

On immediate examination of women, there will be cervical bleeding and the mucus plug is disturbed. On examining the vaginal canal with a speculum, excoriation, lacerations or wounds of the mucous

¹⁰ Modi op cited. p.584

membrane of the vagina may be discovered. The uterus may be found enlarged by bimanual examination or by passing a uterine sound. The enlarged breasts and other signs of pregnancy are the valuable points of diagnosis.

When a substance alleged to have been expelled from the uterus as a product of conception is sent in the medical man for his opinion, he should thoroughly wash it in water to determine if it is a foetus or merely a blood clot, a shred of the dysmenorrhoeal membrane, a polypus, or a fibroid tumors. ¹²

4.7 LEGISLATIVE HISTORY OF LAWS AGAINST FEMALE FOETICIDE

The attitude in India towards foeticide has changed over the centuries. The basic tenets of Hinduism are against foeticide, though it is obvious from the "Atharva Veda" that foeticide was well known in India in the Vedic age and was a punishable offence.¹³ Though the religious code and society in general condemned foeticide, it was obviously common practice in pre-colonial India; the most important reason for this was the custom of child marriage and the prohibition of re-marriage amongst widows of higher castes, who were forced to take recourse of illegal foeticide as the only way to get rid of their unwanted pregnancies, often aided and abetted by sympathetic relatives to protect family honour. Village Dais used to procure foetus in a routine manner, mainly using the various indigenous plants, herbal agents and other substances. This went on until the

¹¹ Ibid p.587

¹² op.cited. p.599.

¹³ *Thus spake Vedas: Ramakrishna Mission, Kanyakumari: 1995, p.79*

first legal provisions against foeticide was made under the British Rule to check and reduce the number of illegal foeticide. The problem of female foeticide went unrecognized for long and it was identified with female infanticide and both these issues were being dealt with as the two sides of the same coin. Tracing the historical development of the laws would give the required insight into the problem.

The earliest efforts to implement the eradication of this practice were made in Kathiawar and Kutch. Alexander Walker, Chief Resident of Baroda attempted to encourage clan Chiefs to enter into deeds renouncing the practice of infanticide in 1808. When authorities discovered that deeds were violated they issued a penalty. Alongside an "infanticide fund" was also set up to defray marriage expense. Later, he even awarded parents of girl children with cash awards. However, these efforts were not made according to any policy, but were rather personal initiatives of the local British administrator. Thus with each new appointment the quality of the initiatives or the method of enforcement, changed; though what remained constant was a keen interest to initiate actions. For instance, Assistant Resident Willoughby was notorious for his elaborate system of informers, and his methods included punitive measures of fines and imprisonment (1834-35), while Erskine sought to end surveillance and adopted education and encouragement to end the practice.¹⁴

Thus moral pressure was successful to some extent but it was reliant on the personal influence of civil servants. The clan Chiefs reverted

¹⁴ Ashih Bose, *Fighting Female Foeticide* : Economic and Political Weekly of India, September 8, 2001.

back to their old practices as soon as the civil servants were transferred. Therefore there was no option but to criminalize the practice (Regulation 21 of 1795 had already been passed in the North West provinces making infanticide punishable; and Regulation 8 of 1803 extending the laws to areas ceded by the Nawab of Oudh already existed, but these laws were not enforced). Yet it was also realized that some effective means of restricting dowries and finding suitable bridegrooms was called for. These realizations were first implemented in Punjab. Here the cause for infanticide was recognized as intense factional rivalry, and so the Government directed its efforts at bringing about reconciliation. Punitive measures tried elsewhere and sumptuary regulations for marriage celebrations and exchanges constituted the most holistic set of measures adopted anywhere.

4.8 The Special Act of 1870¹⁵

Mr. John Strachey drafted a Bill against female infanticide. The Bill streamlined the measures the government could take to check the practice. It suggested:

1. An enlarged police force
2. Increased surveillance
3. Thorough censuses
4. Restrictions on marriage expenses

The Bill was passed and made applicable to the North West Frontier Province, the Punjab and Oudh, and could be extended elsewhere if

¹⁵ www.datamationfoundation.org.in

considered necessary. The apparatus to enforce the Act was provided within the Act and included:

1. Periodic census.
2. Monitoring of pregnant women by village authorities.
3. Meticulous registration of births, and inquests if the child died within a week.
4. Local government was given the legal authority to enforce the measures, and disobedience of any of the provisions was punishable by six months imprisonment and a fine of RS.1000 or both.
5. It made midwives, chokidaars, patwaris, dais, and a range of village officials and functionaries responsible and therefore discouraged a considerable number of people from abetting the crime.

In 1872 after a comprehensive census it was decided that those clans which had a proportion of girls not less than 40% of the total, in the age group under 12 were declared 'guilty of the crime'; and those tribes that had less than 25% girls were declared "very guilty". This provision proved to be highly effective though they were attempts at evasion with some clans going to the extent of 'borrowing' girls from other village at the time of the head count.

Maintenance of registration of births, deaths and marriages was also an effective instrument of suppression.

By 1905, the government of the United Provinces, Agra, and Oudh (former North West province) were of the opinion that the Special Act

of 1870 was no longer needed since "one of the worst social crimes had been stamped out", and the Act was withdrawn in 1906. With that ended the British initiatives against female infanticide.

These pre-independence laws suggest that the government adopted a very holistic approach to the problem. The laws were aimed not only at criminalizing female infanticide but also sought to attack its causes.

Another interesting fact that can be noted is the earlier laws made the whole community liable for the act of female infanticide, since it was presumed that each incidence of such killing had the sanction of the whole community.

The problem of female infanticide has acquired a new dimension with technological developments enabling the parents to determine the sex of the foetus. This has led to the problem of female foeticide, which has grown like an epidemic because of the easy availability of this 'facility'. Also, though criminal law makes the killing of another human being a punishable crime, since the foetus does not have a legal status, abortion does not amount to homicide. Therefore, although female infanticide and foeticide are very related in that they have the same causes and motives, the fact that the female has a different legal and moral status in both cases, makes it difficult for law to deal both cases in the same manner. The laws relating to female foeticide require to be examined separately.

4.9 The Convention on the Right of the Child:

Article 6 of The Convention on the rights of the Child provides that the state shall recognize that every child has the inherent right to life. It also casts the duty upon the state to ensure to the maximum extent possible the survival and development of the child.¹⁶

Female foeticide is the crime whereby the parents determine the sex of the child while it is in the womb, the girl child is killed even before she is born just for the reason that it is a female foetus.

The Convention on Rights of the Child casts a duty upon the state to ensure that no child is discriminated against on the basis of sex. The question is however, whether under the CRC the definition of child being a 'human being up to the age of 18 years' was intended to include an unborn child? Although this is a contentious issue, the answer to this question must be 'yes', as 'up to 18 years' would include the period both 'before' and 'after' birth, until the point the child reaches the age of 18. Also, as can be seen in Art. 24 which urges the states to ensure proper pre-natal care for mothers it can be inferred that the CRC is concerned with the interests of the child even before it is born thus India is under an obligation under the CRC to take all possible measures to prevent the practice of female foeticide, which represents the worst manifestation of sex discrimination.

¹⁶ United Nations Reference in the Field of Human Rights, New York : U.N. Publications, 1993, p.p.73-77.

4.10 The Legal Position

The law did not recognize female foeticide as a separate problem until very recently. Although there was a comprehensive law relating to abortion which is applicable even to the abortion of female fetuses, the policy behind framing a law to combat the problem of female foeticide, being different, the law relating to abortion was insufficient. In fact, since the law of abortion has been liberalized, it is counter productive as far as the problem of female foeticide is concerned. Prof. Balraj Chauhan is of the view that advent of technology is responsible for the misuse, of these techniques and pointed out the issue gained legal attention only recently.¹⁷

Abortion was first penalized under The Indian Penal Code, which makes the causing of a miscarriage (if it is not done in good faith to *save the life of the women*) *an offence punishable with imprisonment* up to seven years. The Code makes both the women who undergo the abortion as well as the abortionist liable to punishment ¹⁸. In case, it is carried out without the consent of the woman (a woman under a misconception, a woman with unsound mind, a woman in an intoxicated state, and a girl below 12 years of age cannot give consent), the person carrying out such an abortion is punishable for life¹⁹. The causing of the death of a woman while inducing abortion is an offence punishable with imprisonment up to ten years and fine²⁰.

¹⁷ Report of Workshop on female foeticide held at Jhansi on 10.03.2003

¹⁸ Sec.: 312; IPC

¹⁹ Sec : 313; IPC

²⁰ Sec : 314; IPC

The most important provision regarding foeticide is the recognition of the foetus as "quick". If a foetus is killed after it becomes "quick" (i.e. *about the fourth or fifth month*), it is punishable with ten years imprisonment if the act would have otherwise amounted to culpable homicide.

Thus, under the IPC as foeticide was an offence (unless undertaken to save the life of the mother), female foeticide was also penalized.

In this regard the Indian Penal Code makes the following acts offences:

- ◆ The causing of a miscarriage (if it is not done in good faith to save the life of the woman) is an offence punishable with imprisonment up to seven years. The Code makes both the woman who undergoes the abortion as well as the abortionist liable to punishment (S. 312).
- ◆ The carrying out of abortions without the consent of the woman, or with consent received under duress or in fear of injury. A woman under a misconception, a woman with unsound mind, a woman in an intoxicated state, and a girl below 12 years of age cannot give consent (S.313).
- ◆ The causing of the death of a woman while inducing abortion is an offence punishable with imprisonment up to ten years and fine (S.314).
- ◆ Doing an act with the intent to prevent the child from being born alive is punishable with 10 years imprisonment (S.315).

- ♦ Causing the death of a “quick” unborn child if the act would otherwise amount to culpable homicide is punishable with imprisonment for 10 years (S.316).

Thus, the IPC did not allow for abortion except where there was danger to the life of the woman. The strict law under the IPC led to a number of ‘underground’ abortions and consequently to unnecessary health complications for the woman. Also there was a change in the policy and attitude of people and Government at international level towards abortion. There was widespread demand for legal abortions. It would be interesting to examine the issue from the legal and human rights angle.

4.11 Abortion as a female human right

The right to abortion, along with family planning and contraception, is a reproductive right as well as a woman’s right because it involves her body. However, there is no international consensus on whether the right to have an abortion is a human right. Proponents and opponents of abortion rights are also highly polarized, leaving little ground for compromise.

The act of procuring or inducing a premature delivery and thus the death of an offspring, called abortion, has been practiced since ancient times. Originally there was little if any moral condemnation of abortion (from the Latin *abortus*, meaning an untimely birth), but in many countries today abortions are illegal or restricted.

In the United States the demand for legal abortions grew out of the women’s rights movement, which took the position that without the

right to control their own reproduction, women could not fully realize other rights, particularly education and economic independence. In addition, a double standard existed: women of economic means could obtain an abortion, albeit illegally, while poor women, who could least afford to raise children properly, could not. Illegal abortions were often performed under less than adequate medical standards, thus greatly increasing the risk of harm to the woman.²¹

The turning point in the United States came in 1973 with the U.S. Supreme Court's decision in the case of *Roe v. Wade*.²² Citing an implicit right of privacy in the U.S. Constitution, it struck down a one-hundred-year-old Texas state law prohibiting abortion except when the mother's life was endangered. From then onwards abortion became legal nationally. Subsequent Supreme Court decisions, however, have added some restrictions on the right to an abortion.

The Roman Catholic Church and a number of other religious organizations and sects oppose the right to an abortion on the grounds that it requires taking the life of an unborn child. Not all adherents of these religions hold the same views, however, and scientists, religious leaders, politicians, and lawyers are still debating the definition of life and when life begins for a human fetus.

Since the 1970s many but not all countries have liberalized their abortion laws. In 1988 Canada's highest court voided that country's restrictive abortion law. In Ireland, where the influence of the

²¹ Calkin Ruth, *Abortion and dialogue. Prochoice, Prolife and American Law*, Cambridge: Black well Publication, 1999 p.412

²² 410 U.S. 179, 1973

Catholic Church is strong, abortions are banned, while in Italy the church's influence has not prevented the legalization of abortion. Other Western European countries permit legal abortion – for example, in 1998 Germany's constitutional court declared unconstitutional a Bavarian law that severely restricted access to abortions – although Finland has limited the grounds for abortion. Eastern European countries generally have liberalized their laws on abortion since the end of World War II. China, because of its overpopulation problem, actually encourages abortions.²³

This same dilemma was faced under English law. Abortion was initially considered a grave felony and treated as capital offence, unless one in order to save the life of the mother.

In the case of *R v. Bourne*²⁴, however the court extended the concept of danger to the life of the mother. The court held that if the doctor is of the opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy is to make the woman a physical or mental wreck, then the belief operates that the abortion was necessary to preserve the life of the mother.

In *R v. Woolnough* (1977) it was stated that the court will not look too narrowly to the question of danger to life where danger to health is anticipated.

²³ Rudy Kathy, *Moral Diversity in Abortion Debate*, North Carolina: 2001 p.p.313-327.

²⁴ (1939) KB 687

However the attitude of the medical profession was in general hostile and in several cases abortions were refused, even in tragic cases where the woman had been raped, or where it was case of a 12 years old girl being pregnant. It was around this time that the two lobbies arose, one fighting for the right of the woman to control her fertility, and the other for the sanctity of life.

Therefore the Abortion Act, 1967 was enacted which provided for abortion in certain circumstances. Abortions were permitted only in cases where there was a risk to the health of either the mother or the foetus.²⁵

In India as well the Medical Termination of Pregnancy Act, 1971 was enacted for the purpose of safeguarding the rights of the pregnant women. The objects and reasons for the MTPA state thus: "In recent years when health services have expanded and hospitals are availed of to the fullest extent by all classes of society, doctors have often been confronted with gravely ill or dying pregnant women whose pregnant uterus have been tampered with a view to causing an abortion and consequently suffered very severely. There is thus avoidable wastage of the mother's health, strength and sometimes." The proposed measure which seeks to liberalize certain existing provisions relating to termination of pregnancy has been conceived (1) as a health measure – when there is a danger to the life or risk to the physical or mental health (deemed to include failure of contraception for a married woman and a pregnancy caused due to rape) of the woman;; (2) on humanitarian grounds such as in the case of a lunatic woman etc. and (3) eugenic grounds – where there is

a substantial risk that the child if born, would suffer from deformities and disease. The Act gives a medical practitioner (one before 12 weeks and the concurrence of 2 between 12 and 20 weeks) the discretion to decide whether such grounds exist, so as to justify an abortion.

This position is reflective of the policy whereby the interest of the mother has been given priority over the life of the foetus. Although the fact that abortion is only allowed under certain circumstances implies that, the right to life of the foetus has been recognized with certain limitations.

The legislation recognizes the woman's right to abortion within a liberally constructed framework, however the judicial decisions have considerably restricted this right of the woman to abort her foetus, particularly of her own free will. In *Saya v. Sri. Ram*²⁶ the court ruled that aborting a foetus without the consent of the husband would amount to cruelty and therefore form ground for divorce under The Hind Marriage Act. The court held that *"In this sort of a case the court has to attach due weight to the general principle underlying the Hindu law of marriage and sonship and the importance attached by Hindus to the principle of spiritual benefit of having a son?"* It is ironical that even when the courts restrict the right to abortion it is to let the 'father' enjoy the spiritual benefits of having a 'son'.

In another recent case (*V. Krishnan v. G. Rajan*) the Madras High Court has held that the MTPA does not confer or recognize the absolute right to terminate a pregnancy in any person. In this

²⁵ Ibid at p.415

judgement the court observed that, "Even the pregnant women cannot terminate the pregnancy except under the circumstances set out in the Act. Even during the first trimester, the woman cannot abort at her will and pleasure. There is no question of abortion on demand".

The judgements though take a conservative stand in interpreting the scope of the Women's right over her own body, such limitation in scope may prove necessary in the Indian context where sex-determination tests and subsequent foeticide of female foetus is a reality.²⁷

4.12 The Medical Termination of Pregnancy Act, An appraisal²⁸

The Act gives a pregnant woman the right to have her pregnancy terminated only under a specified set of circumstances.

Under Section

- ♦ A pregnancy less than 12 weeks old may be terminated by a registered medical practitioner if he believes in good faith that the continuation of pregnancy would involve
 - (a) a risk to the life of the pregnant woman;
 - (b) Grave injury to her physical or mental health [pregnancy alleged to have been caused by rape, and pregnancy on account of failure of contraception in the case of a married woman are presumed to constitute grave injury to the mental health of the woman], or

²⁶ AIR 1983 (P & H) 252

²⁷ Geetha Rameshan : Lawyers Collective (26) 1994.

²⁸ Info: Material Stella Maris College, Chennai.

(c) a substantial risk of the child being born abnormal or handicapped.

- ◆ In determining whether the continuance of a pregnancy would involve such risk or injury to the health of a pregnant woman, her actual or reasonably foreseeable environment has to be taken into account.
- ◆ If the pregnancy is over 12 weeks but less than 20 weeks the concurrent opinions of two registered medical practitioners will have to be taken before the pregnancy can be terminated.
- ◆ Normally a pregnancy cannot be terminated after the 20th week [such termination would attract the relevant provisions of the IPC], except in cases where it is immediately necessary to save the life of the pregnant woman, and has been so certified by a registered medical practitioner. The requirement of the concurrent sanction of two medical practitioners has been exempted since this clause comes into force only in the case of medical emergencies where the abortion is 'immediately necessary' to save the life of the pregnant woman.
- ◆ Medical terminations of pregnancy can be performed only in government hospitals, or in places approved by the government for conducting such procedures. If performed at any other place, such act is illegal, unless done to save the life of the pregnant woman.
- ◆ In the event of a medical termination of pregnancy, only the pregnant woman's consent is required; the husband's consent is not necessary. However if the pregnant woman has not attained the age of 18 years, or if she is above the age of 18, but is of

unsound mind, the pregnancy cannot be terminated without the written consent of her guardian.

Therefore since the law relating to abortion has liberalized abortion before 20 weeks (after which it becomes a crime under the Indian Penal Code), we cannot ban female foeticide per se. What the law seeks to prohibit is therefore foeticide of the female foetus only on grounds of it being female i.e. Sex selective abortion. Since the law seeks to ban sex selective abortion and it cannot ban abortion, what it has sought to do is to ban sex selection.

It was on this account that Legislation banning sex determination tests were enacted.

Sex determination techniques arrived in India in 1975 primarily for the determination of genetic abnormalities. However these techniques came to be widely used to determine the sex of the foetus, and subsequent abortions if the foetus was female. In view of the widespread misuse of this technique, an official directive was issued to the government hospitals to prevent such misuse for sex determination. This led to the commercialization of the medical technique as private clinics mushroomed across the country.

In 1986, Forum Against Sex Determination And Sex Pre-selection (FASDSP), a social action group based in Mumbai, made a systematic attempt to initiate a campaign on the issue, thus pressuring the Maharashtra government to enact the first ever law on the issue in India. The government responded to the public pressure by enacting the Maharashtra Regulation Of Pre-Natal Diagnostic Techniques Act, 1988.

4.13 Salient Features of the Maharashtra Act²⁹

- ◆ The Act bans the use of medical techniques for the determination of sex of the foetus.
- ◆ The Act bans the advertising of the availability of facilities for pre-natal sex determination.
- ◆ The Act however allows a regulated use of the technique in 'approved' and 'licensed' genetic counselling centres, clinic and laboratories. The regulation is sought to be achieved through different bodies appointed by the government.
- ◆ The Act lays down that these tests can be used only for detecting specific conditions, under any one of certain given circumstances, like:
 - (a) The age of the pregnant women should be above 35 years.
 - (b) She must have had 'a history of two or more abortions' or foetal losses.
 - (c) She must have been exposed to potentially teratogenic drugs, radiation, injections, or hazardous chemicals.
 - (d) There must be a family history of mental retardation or physical deformities such as spastic or deaf – mute child, etc.
- ◆ The primary functions of the appropriate authorities are to suspend or cancel the registration of clinics in case of any violations, enforce the rules laid down for their functioning, and investigate complaints of any breach of such rules. The appropriate authority is given the power to search and seize in the course of its investigations. However, the Act given the government the power to alter the decisions of the State

²⁹ Report on female Infanticide and Foeticide : Centre for Child and Law NLSIU, Bangalore: 1999.

Appropriate Authorities (SAA) with respect to the suspension or cancellation of registration of a clinic, on appeal.

- ◆ The Act punished the owner of the medical centre, as well as the doctor responsible for carrying out the tests. The relatives of the pregnant woman were also presumed guilty of forcing the woman to undergo the tests and punished for abetting the crime. The pregnant woman though presumed innocent till proven guilty of undergoing the test of her own free will, was still fined Rs.50. If convicted the punishment could be increased up to three years of rigorous imprisonment.
- ◆ The Act barred a third party from directly moving the courts to prosecute the erring doctors, clinics or laboratories.

This was however repealed by the enactment of a central legislation, namely The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, which was passed on 20.09.1994.

The Central Act which is an improvement on the Maharashtra Regulation of the Use of Pre-Natal Diagnostic Techniques Act, 1988 was passed on the 20th of September 1994.

4.14 PNDT Act an appraisal³⁰

The following are the salient features of the Act:

- ◆ A woman may avail herself of the facility only if she is (a) above the age of 35, or (b) has had two or more 'spontaneous abortions', or (c) if she has a family history of genetic disease, or (d) has been exposed to agents that are potentially harmful to the unborn child.

³⁰ Iyer. S. *Killing the unborn, Law and Morality*, Salem : Cauvery Publications, 2001, p.p.193-203

- ◆ It can only be conducted to detect: (a) genetic abnormalities; (b) genetic metabolic diseases; (c) haemoglobinopathies; (d) sex-linked genetic diseases; (e) congenital abnormalities.
- ◆ The test shall not be used for the purpose of sex determination.
- ◆ The test can be conducted only at duly registered 'genetic counseling centres, laboratories and clinics'.
- ◆ The test cannot be performed without the written and 'informed consent' of the mother.
- ◆ Advertising of the availability of facilities for sex-determination is banned. A violation of this provision results in a maximum of 3 years, imprisonment and/or fine.
- ◆ Violation of the legislation will be considered a cognizable, non-bailable and non-compoundable offence. The owner of an unregistered clinic conducting such a test shall be punished with imprisonment up to three years and a fine of Rs.10,000. A subsequent offence shall be punishable with imprisonment up to five years, and a fine of Rs.50,000. The person seeking the test, shall be punishable with up to 3 years imprisonment and/or a fine of Rs.10,000.
- ◆ The court shall presume unless the contrary is provided that the pregnant women have been compelled by her husband or relative to undergo the test.
- ◆ There shall exist an Appropriate Authority consisting of an appointed officer, who shall be advised by an Advisory Committee, consisting of, three medical experts, one legal expert, three imminent social workers and one government officer. The function of the Appropriate Authority is namely to grant, suspend, cancel

registration; to enforce standards, to investigate complaints of breach, to search and seize records etc.

- ◆ All records etc. are required to be maintained and preserved.
- ◆ The Court shall take cognizance of a complaint only if it is made by the Appropriate Authority or by a person who has given more than 30 days notice the Appropriate Authority.

Thus the law as it stands today may be summarized in the following manner. Foeticide is banned only after the 20th week when it is permissible only to save the life of the mother. If undertaken otherwise it is punishable with 7 to 10 years of imprisonment. Before the 20th week although the Law has specified circumstances in which it may be undertaken, it is left to the discretion of the medical practitioner, and in effect it may therefore be undertaken in almost any circumstance. The act of female foeticide is therefore not effectively a punishable offence under the existing legal framework, but in order to prevent female foeticide the act of sex determination has been made punishable with 3 years imprisonment.

Female Foeticide poses a number of interesting questions. As we began with the prohibitory norm that “no human being can take the life of another human being”, we shall refer back to that and enquire as to whether it applied to foeticide i.e. whether the killing of a foetus amounts to taking the “life” of another “human being”. If this premise does not apply, whether the act is so morally outrageous as to create another legal premise in order to punish it.

Morally speaking, killing a foetus is not the same as killing an infant, we do not get as morally outraged by an abortion of a foetus as we do

when a child has been killed. Legally as well, the killing of an infant is homicide, whereas killing a foetus is not homicide but is an ought to be a special offence against human life. The offence of foeticide must therefore be punished unless there is an excuse or justification for the same.³¹

Can the exercise of choice of the mother to have or not to have a child constitute an excuse or justification for terminating the life of the foetus? Until what stage can the mother exercise her right-even after the foetus has become viable. Does women have a right to give birth or not give birth to child? In *Roe V Wade*, the Supreme Court held this right of women as fundamental.³² If so, is it not her human right? (though it is no longer dependent on the mother for survival). Does the mother at all have a legal right to kill a foetus so long as it is a part of her when she has no legal right to kill herself? The principle events of foetal life can be identified in chronological order as:

1. Conception
2. Implantation
3. Onset of electrical activity in the birth
4. Viability
5. Delivery

Biologically, a foetus is a "human life" at all stages. At the stage of viability however it has the capacity for a separate existence and therefore must be accorded the same status as a newborn. The

³¹ Ibid at p.130

³² Paul.R.C. *Protection of Human Rights*, New Delhi: Common Wealth Publisher, 2000, p.23

violation of the above said prohibitory norm must be examined as follows:

The violation of the prohibitory norm must be undertaken to save an interest greater than the harm entailed in the violation. No act is justified unless its benefit exceeds its cost. There should be no alternative reasonable means for avoiding harm. An act is thus justified only if it is taken to avoid an imminent and impending danger of harm.

There exists no prohibitory norm stating that "you shall not take the life of the foetus". The question therefore is that are we outraged by taking the life of a foetus or merely by taking the life of a foetus merely because it is female.

Proceeding on the first assumption, we would formulate a norm stating that "no human being can take the life of a foetus." Such an act is therefore punishable unless there exists an excuse or justification for the same i.e. only in cases of prevention of a greater harm. The law in India is based on this premise, whereby under the MTP Act, abortion is prohibited except in certain circumstances enlisted in the Act such as health of the mother, child born out of rape etc., all in order to prevent a greater harm. However as far as female foeticide is concerned, killing a foetus on grounds of its sex can hardly be a justification, as there is no greater harm that is sought to be prevented.³³

³³ Report by NLSIU, Bangalore.

We can therefore formulate a secondary norm that where the foetus is being killed only on account of the fact that it is a female foetus, we are morally outraged. We would then formulate a prohibitory norm stating that "no one shall take the life of a foetus merely because it is female". The law shall then seek to prevent such an action. This however proves a little problematic as it is difficult to prove that when the woman is terminating the life of the foetus, she is doing so merely on the grounds that it is a female foetus. It is on account of this fact that the law should criminalise the act of sex determination itself. This has been the policy framework within which The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 was enacted, seeking to prevent the very act of sex determination.³⁴

Therefore, although female foeticide, as well as the act of sex determination, was sought to be punished, the law has proved to be rather ineffective, as is evident from the widespread practice of female foeticide.

The law seeking to punish the act of female foeticide is ineffective as there exists a liberal law of abortion, allowing for foeticide in certain circumstances, including on grounds of 'mental trauma'. As it is left to the discretion of the medical practitioner to determine what constitutes 'mental trauma', he may genuinely believe that the bearing of a female foetus is cause for mental trauma for the mother (on account of poverty, etc.) and allow abortion. In such a case it will be difficult, if not impossible to punish him for the crime of female foeticide.

³⁴ Agarwal. V. *Women and Law in India*, New Delhi: New Century Publication, 2002, p.p.192-201
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The Law has to walk on tight rope, as it is necessary to liberalize the law relating to abortion. Any unreasonable restriction on abortion would be violative of the human rights of the females. Likewise the techniques used for sex determination cannot be prohibited due to medical reasons. Equally on the grounds of morality and protection of human rights female foeticide must be banned. It was for this reason that since what the law sought to prohibit was sex-selective abortion, and it could not do so at the stage of abortion, it has sought to do so at the state of sex selection and therefore punished the act of sex selection itself.

According to the researcher existing laws also proved to be ineffective and inadequate for the following reasons:

Sex determination is carried out through procedures like amniocentesis, CVS, etc. which were methods devised to detect genetic abnormalities, or in later stages through an ultra-sound procedure, which is used for several other purposes as well. The law cannot ban these procedures, but only regulate the centres offering them and to ensure that they are not misused for purposes of sex determination. It is rather ambitious for the government to assume that it can regulate all such clinics, particularly ultrasound tests that are very widely used for sex determination as well as for a host of other purposes. It would thus be almost impossible to seek to regulate these clinics and ensure that they are not used for sex determination tests. In order to even attempt to regulate such clinics/centres /laboratories etc., the vigilance needs to be extremely strong. The Act provides for an appropriate authority (AA) which is hardly a strong method of vigilance. Moreover, it excludes a third

person from making a complaint to the Court, thus eliminating any voluntary forms of vigilance.

Apart from the problem of ineffectiveness, the law poses another serious problem and that is-Who should be punished? Should the mother be punished? Should her husband and relatives be punished? Should the medical practitioner be punished? The Act provides that he ought to be punished, but leaves the question of revocation of licence to the Indian Medical Association (IMA), which rarely takes any action in such situations. Therefore it is proposed that such powers be given to the Court.

4.15 The Laws As It Exist

There is no law prevailing in India at present, which exclusively deal with female foeticide as an offence. What is available is the law to prevent sex selective abortions and the laws to regulate abortions and the provisions in the Indian Penal Code to deal with unauthorized abortions

The relevant Laws as it exist are as follows:

THE PRE-NATAL DIAGNOSTIC TECHNIQUES (REGULATION AND PREVENTION OF MISUSE) ACT,

1994

(Act No:57 of 1994)³⁵

(20th September, 1994)

An act to provide for the regulation of the use of pre-natal diagnostic techniques for the purpose of detecting genetic or metabolic disorders

³⁵ Received the assent of the President on 20.09.1994. Act published in Gaz. of India; 20.09.1994, Part II-S. 1, Ext., P.1 (No.74).

of chromosomal abnormalities or certain congenital mal-formations or sex linked disorders and for the prevention of the misuse of such techniques for the purpose of pre-natal sex determination leading to female foeticide, and for matters connected there with or incidental thereto.

Be it enacted by Parliament in the Fort-fifth Year of the Republic of India as follows:

CHAPTER – I

PREMILINARY

1. Short title, extent and commencement-

- (1) This Act may be called the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994.
- (2) It shall extend to the whole of India except the State of Jammu and Kashmir.
- (3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Definitions – In this Act, unless the context otherwise requires-

- (a) “Appropriate Authority” means the Appropriate Authority appointed under Section 17;
- (b) “Board” means the Central Supervisory Board constituted under Section 7;

- (c) "Genetic Counselling Centre" means an institute, hospital, nursing home or any place, by whatever name called, which provides for genetic counselling to patients;
- (d) "Genetic Clinic" means a clinic, institute, hospital, nursing home or any place, whatever name called, which is used for conducting pre-natal diagnostic procedures;
- (e) "Genetic Laboratory" means a laboratory and includes a place where facilities are provided for conducting analysis or tests of samples received from Genetic Clinic for pre-natal diagnostic test;
- (f) "Gynaecologist" means a person who possesses a post-graduate qualification in gynaecology and obstetrics;
- (g) "Medical geneticist" means a person who possesses a degree or diploma or certificate in medical genetics in the field of pre-natal diagnostic techniques or has experience of not less than two years in such field after obtaining-
 - (1) any one of the medical qualification recognized under the Indian Medical Council Act, 1956; or
 - (2) a post-graduate degree in biological sciences;
- (h) "paediatrician" means a person who possesses a post-graduate qualification in paediatrics;
- (i) "pre-natal diagnostic procedures" means all gynaecological or obstetrical or medical procedures such as ultrasonography, foetoscopy, taking or removing samples of amniotic fluid, chorionic villi, blood or any tissue of a pregnant woman for being sent to a Genetic Laboratory or Genetic Clinic for conducting pre-natal diagnostic test;

- (j) "pre-natal diagnostic techniques" includes all pre-natal diagnostic procedure and pre-natal diagnostic tests;
- (k) "pre-natal diagnostic test" means ultrasonography or any test or analysis of amniotic fluid, chorionic villi, blood or any tissue of a pregnant woman conducted to detect genetic or metabolic disorders or chromosomal abnormalities or congenital anomalies or naemoglobinophathies or sex-linked diseases:
- (l) "prescribed" means by rules made under this Act;
- (m) "registered medical practitioners" means a medical practitioner who possesses any recognized medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956, and whose name has been entered in a State Medical Register;
- (n) "regulations" means regulations framed by the Board under this Act.

CHAPTER - II

REGULATIONS OF GENETIC COUNSELLING CENTRES,

GENETIC LABORATORIES AND GENETIC CLINICS

3. Regulation of Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics – On and from commencement of this Act,-

- (1) no Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic unless registered under this Act, shall conduct or associate with, or help in, conducting activities relating to pre-natal diagnostic techniques;

- (2) no Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic shall employ or cause to be employed any person who does not possess the prescribed qualifications:
- (3) no medical geneticist, gynaecologist, paediatrician, registered medical practitioner or any other person shall conduct or cause to be conducted or aid in conducting by himself or through any other person, any pre-natal diagnostic techniques at a place other than a place registered under this Act.

CHAPTER - III

REGULATION OF PRE-NATAL DIAGNOSTIC TECHNIQUES

4. Regulation of pre-natal diagnostic techniques – On and from the commencement of this Act-

- (1) no place including a registered Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall be used or caused to be used by any person for conducting pre-natal diagnostic techniques except for the purpose specified in clause (2) and after satisfying any of the conditions specified in clause (3);
- (2) no pre-natal diagnostic techniques shall be conducted except for the purpose of detection of any of the following abnormalities, namely:-
 - (i) Chromosomal abnormalities;
 - (ii) Genetic metabolic diseases;

- (iii) Haemoglobinopathies;
 - (iv) Sex-linked genetic diseases;
 - (v) Congenital anomalies;
 - (vi) Any other abnormalities or diseases as may be specified by the Central Supervisory Board;
- (3) no pre-natal diagnostic techniques shall be used or conducted unless the person qualified to do so is satisfied that any of the following conditions are fulfilled, namely:-
- (i) age of the pregnant woman is above thirty-five years;
 - (ii) the pregnant woman has undergone of two or more spontaneous abortions or foetal loss;
 - (iii) the pregnant woman had been exposed to potentially teratogenic agents such as drugs, radiation, infection or chemicals;
 - (iv) the pregnant woman has a family history of mental retardation or physical deformities such as spasticity or any other genetic disease;
 - (v) any other condition as may be specified by the Central Supervisory Board;
- (4) no person, being a relative or the husband of the pregnant woman shall seek or encourage the conduct of any pre-natal diagnostic techniques on here except for the purpose specified in clause (2).
- (5) Written consent of pregnant woman and prohibition of communicating the sex of foetus- (1) No person referred to in clause (2) of Section 3 shall conduct the pre-natal diagnostic procedures unless-

- (a) he has explained all known side and after-effects of such procedures to the pregnant woman concerned;
 - (b) he has obtained in the prescribed form her written consent to undergo such procedures in the language which she understands; and
 - (c) a copy of her written consent obtained under clause (b) is given to the pregnant women.
- (2) No person conducting pre-natal diagnostic procedures shall communicate to the pregnant woman concerned or her relatives the sex of the foetus by words, signs or in any other manner.
- (6) Determination of sex prohibited – On and from the commencement of this Act-
- (a) no Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall conduct or cause to be conducted in its Centre, Laboratory or Clinic, pre-natal diagnostic techniques including ultrasonography, for the purpose of determining the sex of a foetus;
 - (b) no person shall conduct or cause to be conducted any pre-natal diagnostic techniques including ultrasonography for the purpose of determining the sex of a foetus.

CHAPTER – IV

CENTRAL SUPERVISORY BOARD

(7) Constitution of Central Supervisory Board.-

- (1) The Central Government shall constitute a Board to be known as the Central Supervisory Board to exercise the

powers and perform the functions conferred on the Board under this Act.

(2) The Board shall consist of-

- (a) the Minister in charge of the Ministry or Department of Family Welfare, who shall be the Chairman, *ex-officio*;
- (b) the Secretary to the Government of India in charge of the Department of Family Welfare, who shall be the Vice Chairman, *ex-officio*;
- (c) two members to be appointed by the Central Government to represent the Ministries of Central Government in charge of Woman and Child Development and of Law and Justice, *ex-officio*;
- (d) the Director General of Health Services of the Central Government, *ex-officio*;
- (e) ten members to be appointed by the Central Government, two each from amongst-
 - (i) eminent medical geneticists;
 - (ii) eminent gynaecologists and obstetricians;
 - (iii) eminent paediatricians;
 - (iv) eminent social scientists; and
 - (v) representatives of women welfare organizations;
- (f) three women Members of Parliament, of whom two shall be elected by the House of the People and one by the Council of States;

- (g) four members to be appointed by the Central Government by rotation to represent the States and the Union territories, two in the alphabetical order and two in the reverse alphabetical order:

Provided that no appointment under this clause shall be made except on the recommendation of the State Government or, as the case may be, the Union territory;

- (h) an officer, not below the rank of Joint Secretary or equivalent of the Central Government, in charge of Family Welfare who shall be the member-Secretary, *ex-officio*.

(8) Term of Office of members-

- (1) The term of Office of a member, other than an *ex-officio* member, shall be -

- (a) in case of appointment under clause (e) or clause (f) of sub-section (2) of Section 7 three years; and

- (b) in case of appointment under clause (g) of the said sub-section, one year.

- (2) If a causal vacancy occurs in the Office of any other members, whether by reason of his death, resignation or inability to discharge his functions owing to illness or other incapacity, such vacancy shall be filled by the Central Government by making a fresh appointment and the member so appointed shall hold office for the remainder of the term of Office of the person in whose place he is so appointed.

- (3) The Vice-Chairman shall perform such functions as may be assigned to him by the Chairman from time to time.
- (4) The procedure to be followed by the members in the discharge of their functions shall be such as may prescribed.

(9) Meeting of the Board-

- (1) The Board shall meet at such time and place, and shall observe such rules of procedure in regard to the transaction of business at its meetings (including the quorum at such meetings) as may be provided by regulations:

Provided that the Boards shall meet at least once in six months.

- (2) The Chairman and in his absence the Vice-Chairman shall preside at the meetings of the Board.
- (3) If for any reason the Chairman or the Vice-Chairman is unable to attend any meeting of the Board, any other member chosen by the members present at the meeting shall preside at the meeting.
- (4) All questions which come up before any meeting of the Board shall be decided by a majority of the votes of the members present and voting, and in the event of an equality of votes, the Chairman, or in his absence, the person presiding, shall have and exercise a second or casting vote.
- (5) Members other than *ex-officio* members shall receive such allowances, if any, from the Board as may be prescribed.

- (10) Vacancies, etc. not to invalidate proceedings of the Board-

No act or proceeding of the Board shall be invalid merely by reason of-

- (a) any vacancy in, or any defect in the constitution of, the Board; or
- (b) any defect in the appointment of a person acting as a member of the Board; or
- (c) any irregularity in the procedure of the Board not affecting the merits of the case.

- (11) Temporary association of persons with the board for particulars purposes-

- (1) The Board may associate with itself, in such manner and for such proposes as may be determined by regulations, any person whose assistance or advice it may desire in carrying out any of the provisions of this Act.
- (2) A person associated with it by the Board under subsection (1) for any purpose shall have a right to take part in the discussions relevant to that purpose, but shall not have a right to vote at a meeting of the Board and shall not be a member for any other purpose.

- (12) Appointment of officers and other employees of the Board-

- (1) For the purpose of enabling it efficiently to discharge its functions under this Act, the Board may, subject to such regulations as may be made in this behalf, appoint (whether on deputation or otherwise) such number of

officers and other employees as it may consider necessary:

Provided that the appointment of such category of Officers, as may be specified in such regulations, shall be subject to the approval of the Central Government.

- (2) Every Officer or other employee of such category of Officers, as may be specified in such regulations, shall be subject to the approval of the Central Government.
- (13) Authentication of orders and other instruments of the Board-

All orders and decisions of the Board shall be authenticated by the signature of the Chairman or any other member authorized by the Board in this behalf, and all other instruments, issued by the Board shall be authenticated by the signature of the Member-Secretary or any other Officers of the Board authorized in like manner in this behalf.

- (14) Disqualifications for appointment as member-

A person shall be disqualified for being appointed as a member if, he-

- (a) has been convicted and sentenced to imprisonment for an offence which, in the opinion of the Central Government, involves moral turpitude; or
- (b) is an undischarged insolvent; or
- (c) is of unsound mind and stands so declared by a competent Court; or

- (d) has been removed or dismissed from the service of the Government or a Corporation owned or controlled by the Government; or
- (e) has, in the opinion of the Central Government, such financial or other interest in the Board as is likely to affect prejudicially the discharge by him of his functions as a member; or
- (f) has, in the opinion of the Central Government, been associated with the use or promotion of pre-natal diagnostic technique for determination of sex.

(15) Eligibility of member for re-appointment-

Subject to the other terms and conditions of service as may be prescribed, any person ceasing to be a member shall be eligible for re-appointment as such member,

(16) Functions of the Board-

The Board shall have the following functions, namely:

- (a) to advise the Government on policy matters relating to use of pre-natal diagnostic techniques;
- (b) to review implementation of the Act and the rules made thereunder and recommend changes in the said Act and rule to the Central Government;
- (c) to create public awareness against the practice of pre-natal determination of sex and female foeticide;
- (d) to lay down code of conduct to be observed by person working at Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics.

- (e) any other functions as may be specified under the Act.

CHAPTER - V

APPROPRIATE AUTHORITY AND ADVISORY COMMITTEE

(17) **Appropriate Authority and Advisory Committee-**

- (1) The Central Government shall appoint, by notification in the Official Gazette, one or more Appropriate Authorities for each of the Union territories for the purpose of this Act.
- (2) The State Government shall appoint, by notification in the Official Gazette, one or more Appropriate Authorities for the whole or part of the State for the purpose of this Act having regard to the intensity of the problem of pre-natal sex determination leading to female foeticide.
- (3) The Officers appointed as Appropriate Authorities under sub-section (1) or sub-section (2) shall be-
 - (a) when appointed for the whole of the State or the Union territory, of or above the rank of the Joint Director of Health and Family Welfare; and
 - (b) when appointed for any part of the State or the Union territory, of such other rank as the State Government or the Central Government, as the case may be, may deem fit.
- (4) The Appropriate Authority shall have the following functions, namely:

- (a) to grant, suspend or cancel registration of a Genetic Counselling Centre, Genetic Laboratories or Genetic Clinic;
 - (b) to enforce standards prescribed for the Genetic Counselling Centre, Genetic Laboratories and Genetic Clinic;
 - (c) to investigate complaints of breach of the provisions of this Act or the rules made thereunder and take immediate action; and
 - (d) to seek and consider the advice of the Advisory Committee, constituted under sub-section (5) on application for registration and on complaints for suspension or cancellation of registration.
- (5) The Central Government or the State Government, as the case may be, shall constitute an Advisory Committee for each Appropriate Authority to aid and advise the Appropriate Authority in the discharge of its functions, and shall appoint one of the members of the Advisory Committee to be its Chairman.
- (6) The Advisory Committee shall consist of-
- (a) three medical experts from amongst gynaecologists, obstetricians, paediatricians and medical geneticists;
 - (b) one legal expert;
 - (c) one officer to represent the department dealing with information and publicity of the State Government or the Union Territory, as the case may be;

- (d) Three eminent social workers of whom not less than one shall be from amongst representatives of women's organizations.
- (7) No person who, in the opinion of the Central Government or the State Government, as the case may be, has been associated with the use or promotion of pre-natal diagnostic technique for determination of sex shall be appointed as a member of the Advisory Committee.
- (8) The Advisory Committee may meet as and when it thinks fit or on the request of the Appropriate Authority for consideration of any application for registration or any complaint for suspension or cancellation of registration and to give advice thereon:

Provided that the period intervening between any two meetings shall not exceed the prescribed period.

- (9) The terms and conditions subject to which a person may be appointed to the Advisory Committee and the procedure to be followed by such Committee in the discharge of its functions shall be such as may be prescribed.

CHAPTER - VI

REGISTRATION OF GENETIC COUNSELLING CENTRES,

GENETIC LABORATORIES AND GENETIC CLINICS

- (18) Registration of Genetic Counselling Centres, Genetic Laboratories or Genetic Clinics-

- (1) No person shall open any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic after the commencement of this Act unless such Centre, Laboratory or Clinic is duly registered separately or jointly under this Act.
- (2) Every application for registration under sub-section (1) shall be made to the Appropriate Authority in such form and in such manner and shall be accompanied by such fees as may be prescribed.
- (3) Every Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic engaged, either partly or exclusively, in counselling or conducting pre-natal diagnostic techniques for any of the purposes mentioned in Section 4 immediately before the commencement of this Act, shall apply for registration within sixty days from the date of such commencement.
- (4) Subject to the provisions of Section 6 every Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic engaged in counselling or conducting pre-natal diagnostic techniques shall cease to conduct any such counselling or techniques on the expiry of six months from the date of commencement of this Act unless such Centre, Laboratory or Clinic has applied for registered separately or jointly or till such application is disposed of, whichever is earlier.
- (5) No Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic shall be registered under the Act unless the Appropriate Authority is satisfied that such Centre, Laboratory or Clinic is in a position to provide such

facilities, maintain such equipment and standards as may be prescribed.

(19) Certificate of registration-

- (1) The Appropriate Authority shall, after holding an inquiry and after satisfying itself that the applicant has complied with all the requirement of this Act and the rule made thereunder and having regard to the advice of the Advisory Committee in this behalf, grant a certificate of registration in the prescribed form jointly or separately to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, as the case may be
- (2) If, after the inquiry and after giving an opportunity of being heard to the applicant and having regard to the advice of the Advisory Committee, the Appropriate Authority is satisfied that the applicant has not complied with the requirements of this Act or the rules, it shall, for reasons to be recorded in writing, reject the application for registration.
- (3) Every certificate of registration shall be renewed in such manner and after such period and on payment of such fees as may be prescribed.
- (4) The certificate of registration shall be displayed by the registered Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic in a conspicuous place at its place of business.

(20) Cancellation or suspension of registration-

- (1) The Appropriate Authority may *suo motu*, or on complaint, issue a notice to the Genetic Counselling

Centre, Genetic Laboratory or Genetic Clinic to show cause why its registration should not be suspended or cancelled for the reasons mentioned in the notice.

- (2) If, after giving a reasonable opportunity of being heard to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic and having regard to the advice of the Advisory Committee, and the Appropriate Authority is satisfied that there has been a breach of the provisions of this Act or the rules, it may, without prejudice to any criminal action that it may take against such Centre, Laboratory or Clinic, suspend its registration for such period as it may think fit or cancel its registration, as case may be.

- (3) Notwithstanding anything contained in sub-sections (1) and (2), if the Appropriate Authority is, of the opinion that it is necessary or expedient so to do in the public interest, it may, for reasons to be recorded in writing, suspend that registration of any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic without issuing any such notice referred to in sub-section (1).

(21) Appeal-

The Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic may, within thirty days from the date of receipt of the order of suspension or cancellation of registration passed by the Appropriate Authority under Section 20, prefer an appeal against such order to-

- (a) the Central Government, where the appeal is against the order of the Central Appropriate Authority; and

visible representation made by means of any light, sound, smoke or gas.

(23) Offences and penalties-

- (1) Any medical geneticist, gynaecologist, registered medical practitioner or any person who owns a Genetic Counselling Centre, a Genetic Laboratory or a Genetic Clinic or is employed in such a Centre, Laboratory or Clinic and renders his professional or technical services to or at such a Centre, Laboratory or Clinic, whether on an honorary basis or otherwise, and who contravenes any of the provisions of this Act or rules made thereunder shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees and on any subsequent conviction, with imprisonment which may extend to five years and with fine which may extend to *fifty* thousand rupees.
- (2) The name of the registered medical practitioner who has been convicted by the Court under sub-section (1), shall be reported by the Appropriate Authority to the respective State Medical Council for taking necessary action including the removal of his name from the register of the Council for a period of two years for the first offence and permanently for the subsequent offence.
- (3) Any person who seeks the aid of a Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic or of a medical geneticist, gynaecologist or registered medical practitioner for conducting pre-natal diagnostic

techniques on any pregnant woman (including such woman unless she have compelled to undergo such diagnostic techniques) for purposes other than those specified in clause (2) of section 4 shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees and on any subsequent conviction with imprisonment which may extend to five years and with fine which may extend to *fifty* thousand rupees.

(24) Presumption in the case of conduct of pre-natal diagnostic techniques-

Notwithstanding anything in the Indian Evidence Act, 1872, the Court shall presume unless the contrary is proved that the pregnant woman has been compelled by her husband or the relative to undergo pre-natal diagnostic techniques and such person shall be liable for abetment of offence under sub-section (3) of Section 23 and shall be punishable for the offence specified under that section.

(25) Penalty for contravention of the provisions of the Act or rule for which no specific punishment is provided-

Whoever contravenes any of the provisions of this Act or any rules made thereunder, for which no penalty has been elsewhere provided in this Act, shall be punishable with imprisonment for a term which may extend to three months or with fine, which may extend to one thousand rupees or with both and in the case of continuing

contravention with an additional fine which may extend to five hundred rupees for every day during which such contravention continues after conviction for the first such contravention.

(26) Offences by companies-

- (1) Where any offence, punishable under this Act has been committed by a company, every person who, at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

- (2) Notwithstanding anything contained in sub-section (1) where any offence punishable under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of , any director, manager, secretary or other Officer of the company, such director, manager, secretary or other Officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly:

Explanation – For the purposes of this section-

- (a) “company” means any body corporate and includes a firm or other association of individuals, and
- (b) “director” in relation to a firm means a partner in the firm.

(27) Offence to be cognizable, non-bailable and non-compoundable-

Every offence under this Act shall be cognizable, non-bailable and non-compoundable.

(28) Cognizance of offences-

(1) No Court shall take cognizance of an offence under this Act except on a complaint made by-

- (a) the Appropriate Authority concerned, or any officer authorized in this behalf by the Central Government or State Government, as the case may be, or the Appropriate Authority: or

- (b) a person who has given notice of not less than thirty days in the manner prescribed to the Appropriate Authority, of the alleged offence and of his intention to make a complaint to the Court.

(2) No Court other than that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

(3) Where a complaint has been made under clause (b) of sub-section (1) the Court may, on demand by such

person, direct the Appropriate Authority to make available copies of the relevant records in its possession to such person.

CHAPTER – VIII

MISCELLANEOUS

(29) Maintenance of records-

- (1) All records, charts, forms, reports, consent letters and all other documents required to be maintained under this Act and the rules shall be preserved for a period of two years or for such period as may be prescribed:

Provided that, if any criminal or other proceedings are instituted against any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, the records and all other documents of such Centre, Laboratory or Clinic shall be preserved till the final disposal of such proceedings.

- (2) All such records shall, at all reasonable times, be made available for inspection to the Appropriate Authority or to any other person authorized by the Appropriate Authority in this behalf.

(30) Power to search and seize records, etc-

- (1) If the Appropriate Authority has reason to believe that an offence under this Act has been or is being committed at any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, such Authority or any Officer authorized thereof in this behalf may, subject to such rules as may

be prescribed, enter and search at all reasonable times with such assistance, if any, as such authority or Officer considers necessary, such Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic and examine any record, register, document book, pamphlet, advertisement or any other material object found therein and seize the same if such Authority or Officer has reason to believe that it may furnish evidence of the commission of an offence punishable under this Act.

- (2) The provisions of the Code of Criminal Procedure, 1973 relating to searches and seizures shall, so far as may be, apply to every search or seizure made under this Act.

(31) Protection of action taken in good faith-

No suit, prosecution or other legal proceeding shall lie against the Central or the State Government or the Appropriate Authority or any Officer authorized by the Central or State Government or by the Authority for anything which is in good faith done or intended to be done in pursuance of the provisions of this Act.

(32) Power to make rules-

- (1) The Central Government may make rules for carrying out the provisions of this Act.
- (2) In particular and without prejudice, to the generality of the foregoing power, such rules may provide for-
- (a) the minimum qualifications for persons employed at a registered Genetic Counselling Centre, Genetic

Laboratory or Genetic Clinic under clause (1) of Section 3;

- (b) the form in which consent of a pregnant woman has to be obtained under Section 5;
- (c) the procedure to be followed by the members of the Central Supervisory Board in the discharge of their functions under sub-section (4) of Section 8;
- (d) allowances for members other than *ex-officio* members admissible under sub-section (5) of Section 9;
- (e) the period intervening between any two meetings of the Advisory Committee under the proviso to sub-section (8) of Section 17;
- (f) the terms and conditions subject to which a person may appointed to the Advisory Committee and the procedure to be followed by such Committee under sub-section (9) of Section 17;
- (g) the form and manner in which an application shall be made for registration and the fee payable thereof under sub-section (2) of Section 18;
- (h) the facilities to be provided, equipment and other standards to be maintained by the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic under sub-section (5) of Section 18;
- (i) the form in which a certificate of registration shall be issued under sub-section (1) of Section 19;
- (j) the manner in which and the period after which a certificate of registration shall be renewed and the fee

payable for such renewal under sub-section (3) of Section 19;

- (k) the manner in which an appeal may be preferred under section 21;
- (l) the period up to which records, charts, etc. shall be preserved under sub-section (1) of Section 29;
- (m) the manner in which the seizure of documents, records, objects, etc. shall be made the manner in which seizure list shall be prepared and delivered to the person from whose custody such documents, records or objects were seized under sub-section (1) of Section 30;
- (n) any other matter that is required to be, or may be prescribed.

(33) Power to make regulations-

The Board may, with the previous sanction of the Central Government, by notification in the Official Gazette, make regulations not inconsistent with the provisions of this Act and the rules made thereunder to provide for-

- (a) the time and place of the meetings of the Board and the procedure to be followed for the transaction of business at such meetings and the number of members which shall form the quorum under sub-section (1) of Section 9;
- (b) the manner in which a person may be temporarily associated with the Board under sub-section (1) of Section 11;

- (c) the method of appointment, the conditions of service and the scales of pay and allowances of the Officer and other employees of the Board appointed under Section 12;
- (d) generally for the efficient conduct of the affairs of the Board.

(34) Rules and regulations to be laid before Parliament-

Every rule and every regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, which it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.

THE MEDICAL TERMINATION OF PREGNANCY

ACT, 1971

(Act 34 of 1971)

(The text of the Act is printed here as on 31.07.1996)

Statement of Objects and Reasons

1. The Provisions regarding the termination of pregnancy in the Indian Penal Code, which were enacted about a century ago, were drawn up in keeping with the then British Law on the subject. Abortion was made a crime for which the mother as well the abortionist could be punished except where it had to be induced in order to save the life of the mother. It has been stated that this very strict law has been observed in the breach in a very large number of cases all over the country. Furthermore, most of these mothers are married women, and are under no particular necessity to conceal their pregnancy.
2. In recent years, when health services have expanded and hospitals are availed of to the fullest extent by all classes of society, doctors have often been confronted with gravely ill or dying pregnant women whose pregnant uterus have been tampered with, a view to causing an abortion and consequently suffered very severely.
3. There is thus avoidable wastage of the mother's health, strength and, sometimes, life. The proposed measure which seeks to liberalize certain existing provisions relating to termination of pregnancy has been conceived (1) as a health measure – when there is danger to the life or risk to physical or mental health of the woman; (2) on humanitarian grounds – such as when pregnancy arises from a sex crime like rape or intercourse with

lunatic woman, etc; and (3) eugenic grounds – where there is substantial risk that the child, if born, would suffer from deformities and diseases – Gaz. of Ind., 17.11.1969, Pt. II, section 2, Ext.,p.880.

COGNATE ACTS AND PROVISIONS

THE MEDICAL TERMINATION OF PREGNANCY

ACT, 1971

(Act No. 34 of 1971)

(10th August, 1971)

An Act to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto.

Be it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:

1. Short title, extent and commencement-

- (1) This Act may be called the Medical Termination of Pregnancy Act, 1971.
- (2) It extends to the whole of India except the State of Jammu and Kashmir.
- (3) It shall come into force on such date^a as the Central Government may, by notification in the Official Gazette, appoint.

^a Act came into force on 01.04.1972 – See G.S.R. 285 dr. 19.12.1972 Gaz. of Ind., 11.03.1972, Pt. II, Section 3 (i), p.708.

2. Definitions – In this Act, unless the context otherwise requires-

- (a) “guardian” means a person having the care of the person of a minor or a lunatic;
- (b) “lunatic” has the meaning assigned to it in section 3 of the Indian Lunacy Act, 1912;
- (c) “minor” means a person who, under the provisions of the Indian Majority Act, 1875, is to be deemed not to have attained his majority;
- (d) “registered medical practitioner” means a medical practitioner who possesses any recognized medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956, whose name has been entered in a State Medical Register and who has such experience or training in gynaecology and obstetrics as may be prescribed by rules made under this Act.

3. When pregnancies may be terminated by registered medical practitioners-

- (1) Notwithstanding anything contained in the Indian Penal Code, a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.
- (2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner-
 - (a) where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or

- (b) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are,

of the opinion, formed in good faith that-

- (i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or
- (ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Explanation I – Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation II – Where any pregnancy, occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

- (3) In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonably foreseeable environment.
- (4) (a) No pregnancy of a woman, who has not attained the age of eighteen years, or who having attained the age of eighteen years, is a lunatic, shall be terminated except with the consent in writing of her guardian.

- (c) Save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman.
4. Place where pregnancy may be terminated – No termination of pregnancy shall be made in accordance with this Act at any place other than-
- (a) a hospital established or maintained by Government, or
 - (b) a place for the time being approved^b for the purpose of this Act by Government.
5. Sections 3 and 4 when not to apply –
- (1) The provisions of section 4 and so much of the provisions of sub-section (2) of section (3) as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.
 - (2) Notwithstanding anything contained in the Indian Penal Code, the termination of pregnancy by a person who is not a registered medical practitioner shall be an offence punishable under that Code, and that the Code shall, to this extent, stand modified.

Explanation – For the purposes of this section, so much of the provisions of clause (d) of section 2 as relate to the possession, by

^b For some approved hospitals for purpose of medical termination of pregnancies – See Cal. Gaz. Pt. I. p.1268 and Orissa Gaz., 18.10.1974, Pt. III. p.192; Ori. Gaz., 2.7.1993, Pt. III-A. p.433.

a registered medical practitioner of experience or training in gynaecology and obstetrics shall not apply.

6. Power to make rules –

- (1) The Central Government may, by notification in Official Gazette, make rules^c to carry out the provisions of this Act.
- (2) In particular, and without prejudice to the generality of the foregoing power, rules may provide for all or any of the following matters, namely:
 - (a) the experience or training, or both, which a registered medical practitioner shall have if he intends to terminate any pregnancy under this Act; and
 - (b) such other matters as are required to be or may be provided by rules made under the Act.
- (3) Every rule made by the Central Government under this Act shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total of thirty days which may be comprised in one session or in two successive sessions, and before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rules shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

^c For Medical Termination of Pregnancy Rules, 1972 – Sec G.S.R. 286 dated 19.02.1972 – Gaz. of India, 11.03.1972, Pt. II, S. 3(i) p. 708.

7. Power to make regulations^d

(1) The state Government may, by regulations, -

(a) require any such opinion as is referred to in sub-section (2) of Section 3 to be certified by a registered medical practitioner or practitioners concerned, in such form and at such time as may be specified in such regulations, and the preservation of disposal of such certificates.

^d For some such Regulations

Andhra Pradesh

1. Medical Termination of Pregnancy (Andhra Pradesh) Regulation, 1975 – A.P. Gaz., 25.03.1976, Pt. II, p. 153 (No.12)

Bihar

2. Medical Termination of Pregnancy Regulation, 1975 – Bih. Gaz., 13.09.1976, Ext., p.1. (No. Patna 1367)

Karnataka

3. Medical Termination of Pregnancy Regulation, 1972 & 1975 – See Mys. Gaz., 31.03.1972, Pt. IV .S.2C (ii). Ext., p.1 (No.12) and Karna.Gaz., 14.11.1975, Pt. IV.S. 2C (ii) Ext., p. 1 (No.4110).

Kerala

4. Kerala Medical Termination of Pregnancy Regulation, 1975 – See Ker. Gaz., 18.11.1975, Pt. I, S. IV, P. 1, G-1883 (No. 45).

Madhya Pradesh

5. Medical Termination of Pregnancy (Madhya Pradesh) Regulation, 1975 – See M.P. Gaz., 02.01.1976, Ext., p.8.

Maharashtra, Meghalaya, Orissa and West Bangal

6. Medical Termination of Pregnancy Regulation, 1972 – See Maha. Govt. Gaz., 27.04.1972, Pt. IV-A, p. 263. See Megha. Gaz., 01.02.1975, Pt. V-A, p. 25: See Orissa Gaz., 01.01.1973, Ext. p. 1 (No. 4), See Cal. Gaz. 10.08.1972, Pt. I, p. 1091.

Punjab

7. Medical Termination of Pregnancy Regulation, 1976 – See Pun. Govt. Gaz., 08.04.1976, Pt. III, Ext. p. 119.

(b) Require any registered medical practitioner, who terminates a pregnancy, to give intimation of such termination and such other information relating to the termination as may be specified in such regulations.

(c) Prohibit the disclosure, except to such persons and for such purposes as may be specified in such regulations, of intimations given or information furnished in pursuance of such regulations.

(2) The termination given and the information furnished in pursuance of regulations made by virtue of clause (b) of subsection (1) shall be given or furnished, as the case may be, to the Chief Medical Officer of the State.

(3) Any person who wilfully contravenes or wilfully fails to comply with the requirements of any regulation made under subsection (1) shall be liable to be punished with fine which may extend to one thousand rupees.

8. Protection of action taken in good faith-

No suit or other legal proceedings shall be against any registered medical practitioner for any damage caused or likely to be caused by anything, which is in good faith done or intended to be under this Act.

OFFENCES UNDER INDIAN PENAL CODE

Culpable Homicide

299. Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as

is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

ILLUSTRATION

- (a) A lays sticks and turf over a pit with the intention of thereby causing death or with the knowledge that death is likely to be thereby caused. Z, believing the ground to be firm, walks on it, falls in and is killed. A has committed the offence of culpable homicide.
- (b) A knows Z to be behind a bush. B does not know it. A, intending to cause, or knowing to be likely to cause Z's death, induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence; but A has committed the offence of culpable homicide.
- (c) A, by shooting at a fowl with intent to kill and steal it, kills B, who is behind a bush; not knowing that he was there. Here, although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B, or to cause death by doing an act that he knew was likely to cause death.

Explanation 1 – A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of the other, shall be deemed to have caused his death.

Explanation 2 – Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the

death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3 – The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

Murder

300. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or –

2ndly. – If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or–

3rdly. – If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or –

4thly. – If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

ILLUSTRATION

- (a) A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.
- (b) A, knowing that Z is labouring under such a disease that the blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death, or such bodily injury as in the ordinary course of nature would cause death.
- (c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death.
- (d) A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder although he may not have had a premeditated design to kill any particular individual.

When culpable homicide is not murder

Exception 1- Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden

provocation, cause the death of the person who gave the provocation or cause the death of any other person by mistake or accident.

The above exception is subject to the following provisos:

First – That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly – That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly – That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation : Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

ILLUSTRATION

- (a) A, under the influence of passion excited by a provocation given by Z, intentionally kills, Y, Z's child. This is murder, inasmuch as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.
- (b) Y gives grave and sudden provocation to A. A, on this provocation, fires a pistol at Y, neither intending nor knowing himself to be

likely to kill Z, who is near him, but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

- (c) A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest and kills Z. This is murder, inasmuch as the provocation was given by a thing done by a public servant in the exercise of his powers.
- (d) A appears as a witness before Z, a Magistrate. Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words, and kills Z. This is murder.
- (e) A attempts to pull Z's nose. Z, in the exercise of the right of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent passion in consequence and kills Z. This is murder, inasmuch as the provocation as given by a thing done in the exercise of the right of private defence.
- (f) Z strikes B. B is by this provocation excited to violent rage. A, a bystander intending to take advantage of B's rage, and to cause him kill Z, puts a knife into B's hand for that purpose. B kills Z with the knife. Here B may have committed only culpable homicide, but A is guilty of murder.

Exception 2 – Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

ILLUSTRATION

Z attempts to horsewhip A, not in such a manner as to cause a grievous hurt to A. A draws out a pistol. Z persists in the assault. A believing in good faith that he can by no other means prevent himself from being horsewhipped shoots Z dead. A has not committed murder, but only culpable homicide.

Exception 3 – Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4 – Culpable homicide is not murder if it is committed without premeditation in a sudden fight, in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation – It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5 – Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

ILLUSTRATION

A, by instigation, voluntarily causes Z, a person under eighteen years of age to commit suicide. Here on account of Z's youth, he was incapable of giving consent to this own death. A has therefore abetted murder.

Of the Causing of Miscarriage, of Injuries to unborn Children, of the Exposure of Infants, and of the Concealment of Births

Causing miscarriage

312. Whoever voluntarily causes a women with child to miscarry shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend of three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation – A woman who causes herself to miscarry, is within the meaning of this section.

Causing miscarriage without woman's consent

313. Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, shall be punished with imprisonment for life,

or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Death caused by act done with intent to cause miscarriage

314. Whoever, with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if the act is done without the consent of the woman, shall be punished either with imprisonment for life, or with the punishment above-mentioned.

Explanation – It is not essential to this offence that the offender should know that the act is likely to cause death.

Act done with intent to prevent child being born alive or to cause it to die after birth

315. Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

Causing death of quick unborn child by act amounting to culpable homicide

316. Whoever does any act under such circumstances, that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

ILLUSTRATION

A, knowing that he is likely to cause the death of pregnant woman does an act which, if it caused the death of the woman would amount to culpable homicide. The woman is injured but does not die; but he death of an unborn quick child with which she is pregnant is thereby caused. A is guilty of the offence defined in this section.

Exposure and abandonment of child under twelve years, by parent or person having care of it

317. Whoever, being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Explanation- This section is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child die in consequence of the exposure.

Concealment of birth by secret disposal of dead body

318. Whoever, by secretly burying or otherwise disposing of the dead body of a child whether such child die before or after or during its birth, intentionally conceals or endeavours to conceal the birth of such child, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

CHAPTER - V

FIGHTING FEMALE FOETICIDE SUGGESTION AND CONCUSION

CHAPTER - V

FIGHTING FEMALE FOETICIDE

SUGGESTIONS AND CONCLUSION

The present study is an enquiry into the human rights of females in India in the light of female foeticide. Indian culture and the social institutions prevailing in India has an antiquarian past, which leads back to about 3000 B.C. Unlike the other culture and civilisation around the world, Indian civilisation and culture have been developed and modeled strictly upon certain values which stood test of the time. It is mainly because of the fact that the values could absorb and adapt itself to the changes in the world.

Basically, Indian culture and social institutions have been strong founded on the Hindu concepts of family, state, human relationship. Hinduism as we call it today is a way of life and a stream of culture. We cannot think of Indian culture and civilisations, without a reference to the Hindu scripture and mythology. The mythology in which everything in the world is the manifestation of God. The God who is invisible, omnipresent and omnipotent and covers everything and everything is God. To describe this concept the Vedas used the terms "Nirguna, Nirakara Brahma" which is 'Sarva vyapi' and "Sarva Shakthi".

When other religions in the world, assigns a secondary role to 'women' the Hindu culture preaches a harmonious union of 'man' and 'women' which is the foundation of the nature itself. The women is identified as 'Prakruthi' and man as 'Purush'. The women is described as 'Sakthi' and man as 'Shiv'. The harmonious union of

male and female is manifested in the concept of 'Arthanareeshwara'. The women is worshiped in India as the Goddess 'Parasakthi' the Supreme power. She is the mother. She is the sister. She is the daughter. In all these forms she is the symbol of love, affection, kindness and is protected and worshiped. Every woman shall be treated as mother. There is an invocation to the goddess in the following words of 'Devi Stothram' which illustrates the greatness of mother.

"Yaa devi, sarvabootheshu

Mathruroopena Samsthitha;

Namasthasyae, Namasthasyae,

Namasthasyae, Namo Namaha".

"Salutation to the Goddess who is present in every creature and everywhere as mother".

The women were looked upon with high esteem. There are various rituals belonged to the domain of women. The rituals provided women with occasions for socializing with their peers and superiors. Thus women were free and treated at par with or a little above than men. The religion did not prescribe any ban on any rituals or ceremonies to be performed by women. Examples of learned women like Gargi, Maitreyi Tara etc. can be drawn from the scriptures. The characters like Sita, Bhaktha Meera, Droupathi are ideals for women. The brave women like Kannaki, Rani Lakshmibai, Unniyarcha are adorned. But these are all either myths or history. There is a wide gap between the myth and reality.

In reality the women is exploited everywhere. She is deprived of her rights, to property, socializing, right to control her body, right to

work, right to livelihood, reproductive rights and so on. It is a common feeling that women must enjoy only a secondary status in the family and in the society. Any attempt by women to establish herself and to defend her right or to demand her due place in the family or society is viewed as arrogance and often she is described and blamed as unchaste.

It is a matter of great concern that the sex ratio in India has been noted to be adverse to females, and more or less steadily worsening since the first recorded census of 1881. The population sex ratio of India at the turn of the century i.e. in 1901 was 972 females per 1000 males. The Census 2001 has been a little encouraging if we compare the general sex ratio figure, which shot up from 927 in 1991 to 936 in 2001. But surprisingly the 2001 census opened pandoras box showing the inverse sex ratio in the 0 to 6 years age group. An all India figure showed 927 females to 1000 males (down from 945 to 1000 in 1991). Far grimmer ratios prevail in select parts of India; in Uttar Pradesh the number of females per 1000 males is 822. In Uttaranchal, the corresponding figure in the general category is 964 but again for the age group of 0-6 years this is 902. In Punjab the number of females per 1000 males is 750, and in rural Haryana the figure has fallen below 700 females per 1000 males. While the adult sex ratio in Karnataka rose from 960 in 1991 to 964 in 2001, the child sex ratio fell from 960 in 1991 to 949 in 2001. In some districts the ratio of female to male children is far lower than the State average in Jaisalmer district of Rajasthan, the sex ratio is one of the lowest in the world (approximately 550 females per 1000 males). In Tamil Nadu sex ratio was favourable to girls till 1951, after which it began to decline sharply, particularly after 1981. The present sex ratio in

many districts is below 900 females per 1000 males. In Andhra Pradesh the sex ratio of population in the age group of 0-6 year has declined from 975 in 1991 to 964 in 2001.

Compared with the biologically common ratio across the world of 95 girls being born per hundred boys, Singapore and Taiwan have 92 girls, South Korea only 88, and China mere 86. In comparison the Indian ratio of 92.7 girls for 100 boys (though lower than in previous figures of 94.5) still looks far less unfavourable. However, there are more grounds for concern than may be suggested by the current all India average. First, there are substantial variation within India, and the All India average hides the fact that there are state in India where the female-male ratio for children is very much lower than the Indian average. Second it has to be asked whether with the spread of sex-selective abortion, India may catch up with and perhaps even go beyond Korea and China. There is, in fact, strong evidence that this is happening in a big way in many parts of the country.

There is however, something of a social and cultural divide across India, splitting the country into two nearly contiguous halves, in the extent of anit-female bias in natality and post-natality mortality. Since more boys are born than girls everywhere in the world, even without sex-specific abortion, we can use as a classificatory benchmark the female-male ratio among children in advanced industrial countries. The female-male ratio for the 0-6 age group is 94.8 in Germany, 95.0 in the United Kingdom and 95.7 in the United States, and perhaps we can sensibly pick the German ratio of 94.8 as the cut-off point below which we should suspect anti-female intervention.

The use of this dividing line produces as remarkable geographical split of India. There are the state in the north and the west where the female-male ratio of children is consistently below the benchmark figure, led by Punjab, Haryana, Delhi and Gujarat (with ratios between 79.3 and 87.8), and also including, among others Himachal Pradesh, Madhya Pradesh, Rajasthan, Uttar Pradesh, Maharashtra, Jammu and Kashmir and Bihar (a tiny exception is Dadra and Nagar Haveli, with less than a quarter million people altogether). On the other side of the divide, the States in the east and the south tend to have female ratios that are above the benchmark like of 94.8 girls per 100 boys, with Kerala, Andhra Pradesh, West Bengal and Assam (each between 96.3 and 96.6) and also, among others, Orissa, Karnataka and North Eastern States to the east of Bangladesh (Meghalaya, Mizoram, Manipur, Nagaland, Arunahal Pradesh).

Taking together all the evidence that exists, it is clear that this change reflects not a rise in female child mortality, but a fall in female births vis-à-vis male births, and is almost certainly connected with increased availability and use of gender determination of fetuses. The north and the west have clear characteristics of anti-female bias in a way that is not present-or at least not yet visible – in most of the eastern and the southern States. These unfavourable figures are indicative of gender biased attitude of the society against females, which starts from the womb itself. It is high time that the Government and society to act together to arrest this problem. There is no one single solution that can be offered to end this shameful act.

But the following measures are suggested as safeguards to check the spreading menace of female foeticide:

1. Promote female self-esteem, literacy, health and economic independence. The greater empowerment of woman tends to reduce child neglect and mortality, cut down fertility and overcrowding and more generally, broaden social concern and care.
2. Equality of woman and man must not only be regarded a spiritual reality but this equality must be expressed in both individual and social practice. The practice of equality requires not only basic changes in attitude and behaviour by both man and woman but also a fundamental alteration to the structure of society to provide the necessary legal rights and to provide education and employment opportunities for woman.
3. Man and woman alike must break the shackles of gender inequality. Need to create public opinion to accord equality to the girl child and gradually negate the "Male child preference syndrome".
4. Positive motivation campaign should be started by media, so that there is awareness in the country against female foeticide and not to kill the motherhood.
5. It must be established that the religion does not prohibit the female children from performing any rituals including the last rites. The Mata Amruthanda Mayi Mission has recently come out with such efforts. Such efforts must be welcomed and encouraged.
6. Develop a holistic and multidisciplinary approach to the challenging task of sex —selective female foeticide. Equality

and respect for human dignity must permeate all stages of the socialization process. Divine justice demands that the rights of both sexes should be equally respected since neither is to superior to the other in the eyes of God.

7. Government must propagate Family Planning programme at village and district level and make the society aware of imbalance in the ratio of males and females.
8. Family planning programme should focus on effective public education, good counseling and service delivery and the fully voluntary participation of the community and individuals to increase contraceptive prevalence, reduce unplanned pregnancies, and minimize the need for an induced abortion.
9. Convince child less couples coming for adoption at various centers, to opt for baby girl. "Take home a female child, take home security". Many feel that girls are more emotionally supportive and helpful throughout their life. As a matter of fact the female children are in great demand for adoption.
10. Organize seminars on female foeticide on a regular basis, to be addressed by the sociologists, demographers, feminists, medical experts and lawyers.
11. Religious leaders of all communities should be called upon to exhort their community members to shun the evil practice of female foeticide. In 2001 Akat Takht; highest spiritual seat of Sikhs have declared the practice of killing the girl child as "bajjar kurahit" [unpardonable sin]. Those found violating the order against foeticide would be excommunicated from the panth.

12. Complete ban should be imposed on advertisements relating to all sex-selection techniques before or during pregnancy along with abortion facilities.
13. All the medical practitioners, especially the sonographers and gynaecologists, members of the Indian Medical Association and other specialist groups should come forward and should make a common public declaration before reputed public figures, journalists or other authorities and sign an oath that they will not themselves indulge in or abet the nefarious activity of female foeticide.
14. Ultrasound and other Genetic centers should undergo surprise and regular checks for which a team should be constituted comprising members from different sectors of society.
15. Medical Council of India should amend its Code of Ethics to make it more effective against erring doctors.
16. Village and cluster level prevention committee's should be formed to prevent female foeticide.
17. Wide publicity at every level should be made for generating awareness about the legal provisions against female foeticide. The social awareness campaign must cover both legal and the ethical consequences of violating such provisions.
18. Media must play a greater and more responsible role to check this practice of female foeticide.
19. As a pro active strategy, adolescent girls and boys should be gender awareness training. Parents are the primary educators of their sons and daughters about the moral principles that govern human sexuality, fertility and marriage.

20. As a proactive strategy, a monitoring wing at village level comprising members of the community should be constituted to directly monitor pregnant woman and children in the age group of 0-6 years and to look after their health care needs.
21. Distance between Law written in books and its practical applicability should be reduced.
22. Literature concerning different aspects of female foeticide should be published in regional languages and distributed among the masses.
23. Programmes shall be initiated in which parents of one or two daughters, if any one undergoes sterilization, a reasonable amount of money should be given as aid per child, to be paid in installments as the girl goes through school.
24. Start Cradle Baby Schemes and other such schemes to save the female infants from being killed.
25. Female Child should be given free and compulsory education and educational allowance up to class X.

5.1 Property Rights

The problem of female foeticide cannot be solved in isolation by any number of laws: however strong may be their provisions. It is a reflection of the position of women in the society. To curb this practice, a broad and objective approach to the problems faced by females at large is necessary and realistic efforts at their empowerment shall be made by securing them economic freedom. The first step towards that direction shall be ensuring the property rights to females.

A civilized society must ensure that women's inheritance rights are more secure than that of men for the simple reason that women take on the awesome responsibility for producing, nurturing and providing a home for the next generation. Though India has a history of much stronger safeguards for women's rights, after the introduction of colonial norms of property ownership, women's rights suffered serious erosion among all communities, including those that followed matrilineal forms of property ownership in the last few centuries.

Today the culture of son-preference in our society has assumed such vicious forms that in order to make inheritance laws more gender just, we will have to give special weightage to daughters' rights.¹ A deep-rooted opposition to allow women their equal share in family property can be traced in Indian Society. In spite of specific provision in the constitution, prohibiting discrimination based on sex,² our property laws have been coated in gender bias. It is a welcome and bold step to make widows, daughters and mothers, class I heirs, at par with sons, grand sons and great-great-grandsons in the Hindu Succession Act, 1956.³ Another notable feature is that the rights of the women heirs are no longer restricted to the mere enjoyment of the property, but they are entitled to be the full owners of the property as well. But the case of non Hindu Women are entirely different from this Thanks to the Supreme Court verdict in Mary Roy case; ⁴ which recognized that property rights of Christian Women also. The hue and cry raised by the church and clergy against the decision is the most recent eloquent example of the organized male preference of the society and the design to divest the females of their due share. In the

¹ Madhu Kishwar, *Give special weightage to daughters' rights*, The Times of India 17.03.2004

² Art : 16. of Indian Constitution

³ Mulla & Mulla, Hindu Law Top cited p.321

case of Muslim Women, so far no legislation or court verdict has not come to their rescue. Let us wait for the day a 'Mary Roy' from among themselves takes their cause to the apex court.

The position of Hindu Women in the Mitakshra joint family (Coparacenary) is yet to be secured. Under the Mitakshara system property rights are solely vested with the male to the exclusion of all female heirs. Further, the legislation created another restriction by providing that if a family owned a dwelling house, then the daughters would have only the right of residence and nothing more. The property rights are still entrenched in equality. The national laws and local customs often deny women the right to secure title or inherit land, which means they have no collateral to raise credit and improve their lives.⁵

Securing property right absolutely is the most important step towards securing the position of women in society. An example can be drawn from the status of women of the Nair community in Kerala. In this community the female heirs have been given equal share in the ancestral property from time immemorial. The children of the female heirs also inherited equal share along with the Class I male heirs up to the enactment of Hindu Succession Act. The community followed the matrilineal system of property ownership. The female heirs cannot be divested of their right by way of any will or other family settlements. These factors have improved the social and cultural level of 'Nair-Women' tremendously over the years. Their position in society and family are much higher than the women of other forward

⁴ Mary Roy Vs. Union of India 1986

⁵ Kumar R. *In face-off*, 'The Times of India' 17.03.2004.

caste Hindu Communities by virtue of their education and economic status. Most significant fact is that the women in Nair community could break the chains of unreasonable and blind social convictions much long before, their counter parts in the other parts of India could even dream of it.

Therefore, if we have to empower the women truly, the first and foremost thing to be done is to secure them their property rights; which they have been denied for centuries. A uniform law of inheritance shall be enacted conferring equal property rights to female heirs along with the male heirs to own, possess and enjoy the property irrespective of their casts, creed or religion. This is not an easy goal to be achieved. A mere piece of legislation will not bring the desired result. If such legislation is proposed the interest groups would be on their feet to oppose the same tooth and nail. The need of the hour is to create an awareness among the public at large about the property rights of the female heirs. The initiative in this direction shall be taken by the women's organizations and must be patronaged by the political parties. It is unfortunate that the women's organization who spearhead the agitation for the cause of the women have not yet applied their mind seriously to this vital point. It is still more unfortunate that so far no political party has promised to secure property rights to women. The women at large must also realize that securing property rights to themselves is many fold important than securing one third reservation in the legislature.

5.2 Family Welfare Measures:

The large size and rapid growth of population has been a major concern for India throughout the time. It is no doubt advantageous for a country to be blessed with abundant manpower; especially in the field of agriculture, production, defence etc. But the large size of population alone is not a boon. It must be healthy, intelligent and productive. The state must meet the necessities of shelter, food, health and hygiene, education and employment of its subjects out the available resources. In India, the situation is different. Majority of the population is below the poverty line; with inadequate supply food and clothing. Not to speak of shelter. Drinking water itself has become scarce. In health and hygiene of stands at a low level internationally. 30-35% of the adolescence is thrown to streets. The presumption is simple. In the absence of effective reallocation and equitable distribution of income and wealth in the economy, the state cannot cater the demand for the basic necessities of life of its masses even at the bare minimum level. Therefore it is highly necessary to strike a balance between the population growth and available resources at the national level.

The attitude of the people through the ages and the cultural convictions has a lot of bearing to this issue. Historically it is considered as a matter of pride to be blessed with maximum children. This belief is deep rooted in all religions. It has too many historical reasons also. Right from the ancient times, we come across with the blessings of 'Shat putravathi Bhava' (be blessed with 100 sons) lavishly showered upon the bride by the elders at the time of marriage. The religious scriptures and epics also depict the importance of having maximum children.

Interestingly, the phenomenon of population growth has direct effect on the female foeticide / infanticide. Again, there is a predominant preference for male children over the females through the ages and therefore, in the families the female child is often neglected and ill treated. When the family is faced with the hard realities of bringing up the children by giving proper education, nutrition, hygiene, medication and care; the family has to choose from their resources and to fix priorities, the interests of the female child is often seen sacrificed. The family at that juncture may have thousands of justification to offer and the society also accepts it as usual.

Limiting the number of children in a family attains greater importance today. It is important not only from the social and moral point of view, but also from the economic angle. With lesser number of children, the family can provide them better education, health care and nutrition. This will relieve the family of the burden of bring up the children and in turn will half the cruel tendency of eliminating the female child on economic reasons.

There was no much attention paid to the measures of birth control during the pre-independence era. After independence the visionaries of modern India like Pt. Jawaharlal Nehru were convinced about the need for the same and family planning was made one of main policy in the governance of the country.

The very concept of 'family planning' was a controvenial one from the beginning. During the freedom movement itself the subject had been

debated by the Indian National Congress and many other social organizations. There was a stiff resistance from prominent quarters against this, stating that birth control is immoral and anti-religious. Fundamentalist elements though put up stiff resistance, could not properly base their opposition on any religious scriptures or spiritual dictates and hence the resistance was branded as unfounded and slowly subsided. On the other hand the religious resistance from the Islamic and Christian corners were more stuff and borrowed support from their scriptures and texts and the same is still continuing though low at intensity. Thanks, to the level of education attained by the common people of these communities.

The efforts towards effective birth control gained momentum in India during the seventies, when Mrs. Indira Gandhi was the Prime Minister. The successive governments also took the task ahead. In a move to attract more people to the programme and to create better awareness the programme was renamed as 'family welfare programme'.

The Government has made a wide net work covering the Government and private hospitals and clinics to facilitate the implementation of the family welfare measures. Widespread publicity was also given and catching slogans were coined as part of the publicity. The advancement in the medical technology has simplified the means of birth control.

Of late there seems to be slackness on the part of the government at centre and states in implementing the family welfare measures. The

monitoring of the programme by the government has become casual and money thirsty abortion clinics have started to take advantage of the situation to indulge in female foeticide. This researcher had occasions to meet at least a dozen-health workers and para-medical staff working in private hospitals and clinics in different parts of the country who admitted that the clinics resort large scale abortions to eliminate female foetus under the guise of family welfare measures. It is revealed that 99% of abortions done in a clinic Mumbas was female foeticide.

It is a welcome measure that governments of Gujarat and Tamil Nadu have once again come up with effective programmes for the successful implementation of the family welfare programmes. The programmes will be succesful only if there is adequate support from the governmental and non-governmental agencies.

The most important element is to create an awareness among the public on the importance of the programme. Massive awareness campaign shall be taken out periodically and the same shall reach out to the common man in the rural areas. This campaigns should highlight the need for the family welfare measures and the advantages of it at the family level. The effective implementation of birth control measures will certainly enhance the financial status of the family and the health of the rural womenfolk, it will also enable the parents to give better education, care and nutrition to their children and thereby reduce their burden. Consequent to this the saving habit of the rural poor will be developed and they would be securing the fund for the marriage of their daughter. Once the

economic condition and saving habit of the community brightens up; the aversion for girl child will be reduced.

The social status of the women is a very important aspect as discussed earlier. The women should have increased say in their family matters. Most of the abortions are carried out without the free consent of the women. The consent is obtained in most cases by threat or inducement. Women must be educated about their rights and they should cultivate the courage and strength to decide the matters affecting her body and self.

The women in India are divided between different personal laws which is the greatest hurdle towards securing gender justice. Therefore, it is highly essential to have a uniform civil code for India.

5.3 Need for Uniform Civil Code

The Indian Constitution, in its Part IV. Article 44 directs the State to provide a Uniform Civil Code throughout the territory of India. However it is only a directive principle of State Policy, therefore it cannot be enforced in a court of law. It is the prerogative of the State to introduce Uniform Civil Code. The Constituent Assembly Debates clearly show that there was a wide spread opposition to the incorporation of Article 44 (Art. 35 in the Draft constitution), particularly from the Muslim members of the Assembly.⁶ Naziruddin Ahmed, Mohd Ismail Sahib, Pocker Sahib Bahadur and Hussain Sahib etc., made a scathing attack on the idea of having a Uniform Civil Code in India on the grounds that the right to follow personal law is part of the way of life of those people who are following such

⁶ CAD Book No.2, Vol III p.p. 538, 552

laws, that it is part of their religion and part of misunderstanding and resentment amongst the various sections of the country and that in a country so diverse it is not possible to have uniformity of civil law. However, one of the most illustrious members of the Assembly, K.M. Munshi strongly felt that if the personal law of inheritance, succession etc is considered as a part of the religion, the equality of women can never be achieved.⁷

The Chairman of the Drafting committee Dr.B.R. Ambedkar stated that in our country there is practically a Civil Code, uniform in its content and applicable to the whole of the country. He cited many instances like Uniform Criminal law, Transfer of property and Negotiable Instruments Act, which are applicable to one and all. However he conceded that the only province, the civil law has not been able to invade so far is marriage and succession. He also dispelled the arguments of certain muslim members that the muslim law is immutable and uniform throughout India. He cited the example of the North-West Frontier Province which was not subject to the Shariat law prior to 1935 and until then followed the Hindu law in the matter of succession etc.⁸ Similarly in the North Malabar region of Kerala, the Marumakkatayan law applied to all, not only to Hindus but also to Muslims. Uptill 1937, in the rest of India, the various parts, such as the United Provinces, the Central Provinces and Bombay, the Muslims to a large extent were governed by the Hindu law of succession.

⁷ CAD. Vol. III p.548

⁸ CAD. Vol. III p.550

Some of the learned members however predicted that a stage would come when the Civil Code would be uniform and stated that power given to the State to make the Civil Code uniform is in advance of the time.⁹ Dr. Ambedkar also opined that it is perfectly possible that the future parliament may make a provision by way of making a beginning that the code shall apply only to those who make a declaration that they are prepared to be bound by it, so that in the initial stage, the application of the Code may be purely voluntary.¹⁰ The foregoing discussion clearly established that the framers of the constitution were aware of the gender injustice and sexual inequality of women and they incorporated Article 44 in the constitution hoping that it would be introduced in future at the appropriate time. It is really unfortunate that even after 50 years of independence, the State did not find it necessary to make any efforts to honour this constitutional commitment. A Uniform or Common Civil Code is possible only when the Government consider the gender justice as the ultimate goal.

5.4 Judicial Behaviour and Uniform Civil Code:

The judiciary in India has taken note of the injustice done to the women in the matters of many personal laws. It has been voicing its concern through a few judgments, indicating the necessity to have uniformity in personal matters of all the citizens. In the case of *Mohd. Ahmed Khan vs. Shah Bano Begum*¹¹ pertaining to the liability of a muslim husband to maintain his divorced wife beyond 'iddat' period, who is not able to maintain herself, the Supreme Court held that Section 125 Cr. P.C. which imposes such obligation on all the

⁹ Per Mr. Naziruddin Ahmad, CAD Vol. III p.542 dt. 23rd November, 1948.

¹⁰ CAD Vol. VII p.551

husbands is secular in character and is applicable to all religious. The Court speaking through Chief Justice Y.V. Chandrachud held:

“It is also a matter of regret that Article 44 of our Constitution has remained a deed letter..... There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the muslim community to take a lead in the matter of reforms of their personal law. A common civil code will help the cause of national integration by removing disparate loyalties to laws, which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably; it has the legislative competence to do so. A counsel in the case whispered, somewhat audibly, that legislative competence is quire another. We understand the difficulties involved in bringing persons of different sections on a common platform. But, a beginning has to be made if the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the Courts because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of Courts to bridge that gap between personal laws cannot take the place of a common civil code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case”.

In *Maharshi Avadhesh vs Union of India*¹², the Supreme Court declined to nullify the Muslim Women Protection of Rights on Divorce Act, 1986 and declined to direct the Government not to enact Shariat Act so as to affect the rights of Muslim Women.

¹¹ AIR 1985, SC 945

¹² (1994) 1 SC 713

In *Ms. Jordan Deigndeh vs. S.S. Chopra*,¹³ D, Chinnappa Reddy, J speaking for the court referred to the observations of Chandrachud, C.J. in Shah Bano Begum's case and observed as under:

"..... The present case is yet another, which focuses.... on the immediate and compulsive need for a uniform civil code. The totally unsatisfactory state of affairs consequent on the lack of a uniform civil code is exposed by the facts of the present case....."

In *Reynold Rajamani vs Union of India*¹⁴ the court rejected a prayer to remove the discrimination between men and women under Section 10 of Indian Divorce Act, 1869.

Again recently in *S. Mudgal vs. U.O.I.*,¹⁵ a division bench of the Supreme Court consisting of Kuldeep Singh and R.M. Sahai, JJ strongly advocated the introduction of a uniform civil code in India. In this case the Supreme Court held that conversion of a Hindu male to Islam only for the purpose of contracting bigamous marriages circumvents Sec.494 of I.P.C. Such marriages have been declared as bigamous and void by the court. The Court after referring to various precedents on the point, categorically held that till uniform civil code is achieved for all the Indian Citizens, there would be an inducement to a Hindu husband who wants to enter into second marriage while the first marriage is subsisting, to become a Muslim. Here the court was pointing out the injustice done to the first wife, legally wedded.

¹³ AIR 1985 SC 935

¹⁴ AIR 1982 SC 1261

¹⁵ AIR 1995 SC 1531

The Bench noted the failure of successive governments till date, to implement the constitutional mandate under Article 44 of the constitution of India. It was suggested that the personal laws of the minorities should be rationalized to develop religious and cultural amity preferably by entrusting the responsibility to the Law Commission and Minorities Commission. The Bench further directed the Government of India to file an affidavit indicating the steps taken and efforts made to have a fresh look at Article 44 in August, 1996. However this latter direction was treated as “obiterdicta” by the court subsequently.

In a recent judgment, *Lily Thomas vs. Union of India*,¹⁶ while dealing with the validity of the second marriage contracted by a Hindu husband after his conversion to Islam, the Supreme Court clarified that the court had not issued any directions for the codification of a common civil code and that the judges constituting the different Benches had only expressed their views in the facts and circumstances of those cases. It appears that the apex judiciary in India, which showed great judicial activism initially with regard to uniform civil code, has taken a backward step with this clarification.

Thus, it is clear that no gender justice could be rendered in its comprehensive sense, unless we have a uniform civil code containing the best provisions taken from all the religions, with the sole aim of doing gender justice. Unless the women, irrespective of their religious affiliation have been conferred equal rights on par with men in personal matters, the constitutional mandate of right to equality of status and opportunity cannot be implemented. It is most

unfortunate that the debate on uniform civil code has attained the colour of Muslims and Others. What it should have attained is a colour of Women vs her exploiters.

5.5 Foetus Rights as Human Rights

It is argued that all female rights are and shall be human rights. This researcher also fully subscribe to the view. But all these arguments relate to the rights available to females after they take birth. All the theories of feminist jurisprudence are also essentially centred around the rights which the female can enjoy or shall enjoy in pursuit of their life. But how they can enjoy any right if they are denied the opportunity to take birth itself? This issue was ignored for a long period of time, rather the issue failed to catch the attention of the conscious of the society for long. Now the society, the judiciary and the law has realized the magnitude of this horrifying problem, a challenge to the very existence of females in the world.

Therefore, it is submitted that the concept of right to life and other human rights shall be extended beyond the traditional concept of life; so as to cover the foetus rights too. In this background the present attempt to enquire into the legal and human aspects of the problem assumes greater significance.

The serious handicap, which was encountered by this researcher, was the non-availability of adequate and reliable data on the female foeticide. Much studies are not done so far at the national level. Whatever studies are made are at the local or regional level.

¹⁶ (2000) 6 SCC 224 (259) = AIR 2000 SC 1650

Therefore, the researcher had to depend largely upon such study report and draw up the national hypothesis by complying with these data. A study conducted by the National Law School of India University, Bangalore was of much help and a regional level workshop conducted at Jhansi on 10.03.2003 under the auspicious of VATSALYA and UNICEF which this researcher had a occasion to attend was also of great importance. Based on the data available from the above reports, the statues and on the basis of an independent survey conducted by the researcher herself with the help of a few friends and well wishers certain inferences and conclusions are drawn up which are summarized hereunder.

1. The problem of female foeticide is persistent for a long time in India, but the law has addressed this issue as a distinct legal problem only recently.
2. The advancement of medical technology and improvement in the conditions of life of people, and the consumer culture that is being cultivated by people now has aggravated the situation.
3. There is a clear preference for male children in Indian societies; especially in the Northern and Western regions due to social convictions as well as economic reasons.
4. Education and social status is no barrier for those who are interested in Female Foeticide.
5. Though poverty can be attributed as one of the chief reasons; this practice is prevailing among the affluent class in the society.
6. The interest and wishes of the females are not taken into consideration while resorting to foeticide. Usually the females are subjected to the pressure of husbands and relatives.

7. Punishing the females who get themselves aborted will not serve much purpose.
8. Hospitals, clinic and medical profession by and large sees it as a lucrative business.
9. The existence of laws though armed with strict provisions have been proved to be ineffective in operation.
10. The people have very low legal awareness.
11. People do not feel the guilt in killing the foetus as they think there was no life in it. Therefore it is highly necessary to recognize the foetus rights as human rights.
12. The doctors are also not aware of the seriousness of the law.
13. The problem persists because women's rights have not been given due recognition in our society. Women's right to control her own body, women's right to choose the sex of the offspring and even women' right to have sex or not in a marital relationship have not received due attention.
14. The decision-making ability of women relating to the child in family is restricted by cultural practices.
15. This problem cannot be viewed in isolation as it forms part of the large arena of atrocities against women.

5.6 Lacuna in the Existing Laws

In spite of various stringent provisions made in the existing laws, the problem of female foeticide is on an increase. This is evident from the declining sex ratio at birth and the findings of various study groups who undertook the study at micro level in different parts of the country. The problem lies in the attitude of the society at large

towards the construction of family and towards the place of female child in the family. There is also lack of political will among the policy framers and implementers. Certain inherent lacunae have been found in the enactment and implementation of law.

The law is intended to regulate the sex determination and thereby to check the female foeticide. The law is not designed to ban or eliminate female foeticide. As pre-natal diagnostic techniques are essential to diagnostic genetic and hereditary disorders of the foetus, it is not possible to ban such test. Liberalization of laws relating to abortion is also need of the time and hence what the law could do is to provide safeguards. Corruption, bureaucratic hassles and redetapism have added fuel to the fire.

It is found that most of the hospitals, clinic and the machines used for pre-natal diagnoses are not registered as required under PNDT Act. The economic and social structure that is essential for securing implementation of law does not exist in India. The patriarchal attitude of society hinders the effective implementation of the law and it is against the interests of women.

Though there is provision to suspend or cancel the registration of medical practitioners found guilty under the PNDT Act, the task is entrusted to the Indian Medical Council. The Medical Council usually does not resort to such a practice. Therefore, it is suggested that power shall be vested with the court, which is competent to try the cases under the Act.

Another important lacuna is that the interested persons and groups cannot complain and bring out an action under the Act. The consequence is that the actual practice of female foeticide often goes unreported. The lack of effectiveness in the implementation of law is evident from the unofficial reports that an approximately 20 lacs female foeticide are aborted every year in our country, but there is hardly any case is seen registered exclusively against this crime.

The female foeticide is purely a human rights issue. It is a result of abuse of scientific technology. It depicts the powerlessness of women against an ideological onslaught of forces opposed to the independence of and emancipation of women. It is an example how the women are viewed by our society – just as a commodity for consumption.

5.7. Reforms Suggested

In the light of the above two important reforms must come in the field of law.

1. The female foeticide must be treated as a separate and distinct offence and a special law to ban the same and to provide punishment for the commission of the offence shall be enacted.
2. Members of the general public must be empowered to bring in an action under the PNDT Act.

It is an accepted fact that decline in sex ratio will have serious social consequence. The decline will play havoc with the population stabilization programme, which requires a balanced gender ratio and a limit as the number of children born every year. Female foeticide will disempower Indian women. As sociologists stress, it is only empowered women who rise similar children and nurture strong

families. Therefore, the most important step to curb this menace should be the empowerment of women. Empowerment of women can come only through proper education and by securing them economic development. Economic development of women is the most challenging task to be achieved; as it would empower not only the women, but the nation as a whole. It would be valuable to remember the words of Mahatma Gandhi who said “ When women, whom we call ‘**ABALA**’ become ‘**SABALA**’, all those who are helpless will become powerful.

‘Swami Vivekananda’ pinned his hope on the capacity of Indian Women when he said: “women must be in a position to solve their own problems in their own way. No one can or ought to do this for them. And our Indian women are as capable of doing it as any in the world”¹⁷

To conclude I would take the wordings of M.Grewe.

Born at the Indian Ganges aside,
 death laughs, because you mum's legs are openwide
 drop down, guilty soon you'll be
 a senseless piece of meat which is going to bleed
 toys of the Gods, old religion's law
 accept the fact life turns into gave
 living a life people don't understand
 massacred, beaten to death by an old fanatic land
 ruined.....
 decay of human pride

¹⁷ Swami Vivekananda, *Thoughts of Power*, Almora: Mayavati Advaita Ashram p.p.36.37

fate
in a womb you cannot hide
so better close your eyes,
female infanticide
fall deep- onto the dirty rotten ground
the ship of life decides to let you die
peace they never found
pull out of the warm and lovely hut
father judging over you: eyes forever shut
bones meted to dust, the whiplash rises high
you're breathing out your inner life
humanity begins to cry
megagenocide, mankind they derange
a ritual that will never change.¹⁸

¹⁸ Taken from "Avashesh" Female Infanticide and Foeticide. A Legal Perspective edited by Kapur D Alam S and Andal. R on behalf of Centre for Child and the Law, National Law School of Indian University, Bangalore.

APPENDICES

APPENDICE – I

THE PROTECTION OF HUMAN RIGHTS ACT, 1993

(Act No.10 of 1994)¹

An Act to provide for the constitution of a National Human Rights Commission, State Human Rights Commissions in States and Human Rights Courts for better protection of human rights and for matters connected therewith or incidental thereto.

Be it enacted by Parliament in the Forty-fourth year of the Republic of India as follows:

CHAPTER – I

PRELIMINARY

1. Short title, extent and commencement.-

(1) This Act may be called the Protection of Human Rights Act, 1993.

(2) It extends to the whole of India:

Provided that it shall apply to the State of Jammu and Kashmir only in so far as it pertains to the matters relatable to any of the entries enumerated in List I or List III in the Seventh Schedule to the Constitution as applicable to that State.

(3) It shall be deemed to have come into force on the 28th day of September 1993.

2. **Definitions.** – In this Act, unless the context otherwise requires,-

(a) “armed forces” means the naval, military and force and includes any other armed forces of the Union;

- (b) "*Chairperson*" means the Chairperson of the Commission or of the State Commission as the case may be ;
- (c) "*Commission*" means the National Human Rights Commission constituted under Section 3;
- (d) "*human rights*" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by Courts in India;
- (e) "*Human Rights Court*" means the Human Rights Court specified under Section 30;
- (f) "*International Covenants*" means the International Covenants on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on the 16th December 1966'
- (g) "*Member*" means a Member of the Commission or of the State Commission, as the case may be, and includes the Chairperson;
- (h) "*National Commission for Minorities*" means the National Commission for Minorities constituted under Section 3 of the National Commission Minorities Act, 1992 (19 of 1992);
- (i) "*National Commission for the Scheduled Castes and Scheduled Tribes*" means the National Commission for the Scheduled Castes and Scheduled Tribes referred to in Article 338 of the Constitution;
- (j) "*National Commission for Women*" means the National Commission for Women constituted under Section 3 of the National Commission for Women Act, 1990 (20 of 1990)
- (k) "*notification*" means a notification published in official Gazette;
- (l) "*prescribed*" means prescribed by rules made under this Act;

¹ Received the assent of the president on January 8, 1994 and published in the Gazette of India, Extra., Part II, Section I, dated 10th January, 1994, pp 1-16, Sl. No:10.

(m) "*public servant*" shall have the meaning assigned to it in Section 21 of the Indian Penal Code (45 of 1860);

(n) "*State Commission*" means a *State Human Rights Commission constituted under Section 21.*

(2) Any reference in this Act to a law, which is not in force in the State of Jammu and Kashmir, shall, in relation to that State, be construed as a reference to a corresponding law, if any, in force in that State.

CHAPTER - II

THE NATIONAL HUMAN RIGHTS COMMISSION

3. Constitution of a National Human Rights Commission.-

(1) The Central Government shall constitute a body to be known as the National Human Rights Commission to exercise the powers conferred upon, and to perform the functions assigned to, it under this Act.

(2) The Commission shall consists of-

(a) a Chairperson who has been a Chief Justice of the Supreme Court;

(b) one Member who is, or has been, a Judge of the Supreme Court;

(c) one Member who is, or has been, the Chief Justice of a High Court;

(d) two Members to be appointed from amongst persons having knowledge of, or practical experience in, matters relating to human rights.

(3) The Chairperson, of the National Commission for Minorities, the National Commission for the Scheduled Castes and Scheduled

Tribes and the National Commission for Women, shall be deemed to be Members of the Commission for the discharge of functions specified in clauses (b) to (j) of Section 12.

- (4) There shall be a Secretary-General who shall be the Chief Executive Officer of the Commission and shall exercise such powers and discharge such functions of the Commission as it may delegate to him.
- (5) The headquarters of the Commission shall be at Delhi, and the Commission may, with the previous approval of the Central Government, establish offices at other places in India.

4. Appointment of Chairperson and other Members.-

- (1) The Chairperson and other Members shall be appointed by the President by warrant under his hand and seal:

Provided that every appointment under this sub-section shall be made after obtaining recommendations of a Committee consisting of-

- (a) the Prime Minister - Chairperson;
- (b) Speaker of the House of the People - Member;
- (c) Minister in charge of the Minister of Home Affairs in the Government of India - Member;
- (d) Leader of the Opposition in the House of the People - Member;
- (e) Leader of the Opposition in the Council of State - Member;
- (f) Deputy Chairman of the Council of State - Member;

Provided further that no sitting Judge of the Supreme Court or sitting Chief Justice of a High Court shall be appointed except after consultation with the Chief Justice of India.

- (2) No appointment of a Chairperson or a Member shall be invalid merely by reason of any vacancy in the Committee.

5. Removal of a Member of the Commission.-

- (1) Subject to the provisions of sub-section (2), the Chairperson or any other Member of the Commission shall only be removed from his office by order of the President on the ground of proved misbehaviour or incapacity after the Supreme Court, on reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed in that behalf by the Supreme Court, reported that the Chairperson or such other Members, as the case be, ought on any such ground to be removed;
- (2) Notwithstanding anything in sub-section (1), the President may by order remove from office the Chairperson or any other Member if the Chairperson or such other Members, as the case may be-
- (a) is adjudged an insolvent; or
 - (b) engages during his term of office in any paid employment outside the duties of his office, or
 - (c) is unfit to continue in office by reason of infirmity of mind or body; or
 - (d) is of unsound mind and stands so declared by a competent Court; or
 - (e) is convicted and sentenced to imprisonment for an offence which in the opinion of the President involves moral turpitude.

6. Term of office of Members.-

- (1) A person appointed as Chairperson shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of seventy years, whichever is earlier.

- (2) A person appointed as a Member shall hold office for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointment for another term of five years;

Provided that no Member shall hold office after he has attained the age of seventy years.

- (3) On ceasing to hold office, a Chairperson or a Member shall be ineligible for further employment under the Government of India or under the Government of any State.

7. Member to act as Chairperson or to discharge his functions in certain circumstances.-

- (1) In the event of the occurrence of any vacancy in the office of the Chairperson by reason his death, resignation or otherwise, the President may, by notification, authorize one of the Members to act as the Chairperson until the appointment of a new Chairperson to fill such vacancy.

- (2) When the Chairperson is unable to discharge his functions owing to absence on leave otherwise, such one of the Members as the President may, on notification, authorize in this behalf, shall discharge the functions of the Chairperson until the date on which the Chairperson resumes his duties.

8. Terms and conditions of Chairpersons and Members.-

The salaries and allowances payable to, and other terms and conditions of service of, the Members shall be such as may be prescribed:

Provided that neither the salary and allowances nor the other terms and conditions of service of a member shall be varied to his disadvantage after his appointment.

9. Vacancies, etc, not to invalidate the proceedings of the Commission.-

No act or proceedings of the Commission shall be questioned or shall be invalidated merely on the ground of existence of any vacancy or defect in the constitution of the Commission.

10. Procedure to be regulated by the Commission.-

- (1) The Commission shall meet at such time and place as the Chairperson may think fit.
- (2) The Commission shall regulate its own procedure.
- (3) All orders and decision of the Commission shall be authenticated by the Secretary-General or any other officer of the Commission duly authorized by the Chairperson in this behalf.

11. Officers and other staff of the Commission.-

- (1) The Central Government shall make available to the Commission-
 - (a) an officer of the rank of the Secretary to the Government of India who shall be the Secretary-General of the Commission; and
 - (b) such police and investigating staff under an officer not below the rank of a Director-General of Police and such other officers and staff as may be necessary for the efficient performance of the functions of the Commission.
- (2) Subject to such rules as may be made by the Central Government in this behalf, the Commission may appoint such other administrative, technical and scientific staff as it may consider necessary.
- (3) The salaries, allowances and conditions of service of the officers and other staff appointed under sub-section (2) shall be such as may be prescribed.

CHAPTER - III

FUNCTIONS AND POWERS OF THE COMMISSION

12. Functions of the Commission.-

The Commission shall perform all or any of the following functions, namely:-

- (a) inquire, *suo moto* or on a petition presented to it by victim or any person on his behalf, into complaint of, -
 - (i) violation of human rights or abatement thereof; or
 - (ii) negligence in the prevention of such violation by a public servant;
- (b) intervene in any proceedings involving any allegation of violation of human rights opening before a Court with a approval of such Court;
- (c) visit, under intimation to the State Government, any jail or any other institution under the control of the State Government, where persons are detained or lodged for purposes of treatment, reformation or protection to study the living condition of the inmates and make recommendations thereon;
- (d) review of safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights and recommended measures for their effective implementation;
- (e) review the factors, including acts of terrorism, that inhibit the enjoyment of human rights and recommended appropriate remedial measures;
- (f) study treaties and other international instruments on human rights and make recommendations for their effective implementation;

- (g) undertake and promote research in the field of human rights;
- (h) spread human rights literacy among various sections of society and promote awareness, of the safeguards available for the protection of these rights, through publications, the media, seminars and other available means;
- (i) encourage the efforts of non-governmental organizations and institutions working in the field of human rights;
- (j) any other functions as it may consider necessary for the promotion of human rights.

13. Powers relating to inquiries.-

- (1) The Commission shall, while inquiring into complaints under the Act have all the powers of a civil Court trying a suit under the Code of Civil Procedures, 1908 (5 of 1908), and in particular in respect of the following matters, namely:-
 - (a) summoning and enforcing the attendance of witnesses and examining them on oath;
 - (b) discovery and production of any documents;
 - (c) receiving evidence on affidavits;
 - (d) requisitioning any public record or copy thereof from any Court or office;
 - (e) issuing commissions for the examination of witnesses or documents;
 - (f) any other matter which may be prescribed.
- (2) The Commission shall have power to require any person, subject to any privilege which may be claimed by that person under any law for the time being in force, to furnish information on such points or matters as, in the opinion of the Commission, may be useful for, or relevant to, the subject-matter of the inquiry and any person so required shall be deemed to be

legally bound to furnish such information with the meaning of Sections 176 and 177 of the Indian Penal Code (45 of 1860).

- (3) The Commission or any other office, not below the rank of a Gazette Officer, specially authorized in this behalf by the Commission may enter any building or place where the Commission has reason to believe that any document relating to the subject-matter of the inquiry may be found, and may seize any such document or take extracts or copies therefrom subject to the provisions of Section 100 of the Code of Criminal Procedure, 1973 (2 of 1974), insofar as it may be applicable.
- (4) The Commission shall be deemed to be a civil Court and when any offence as is described in Section 175, Section 178, Section 179, Section 180 or Section 228 of the Indian Penal Code (45 of 1860) is committed in the view of presence of the Commission, the Commission may, after recording the facts constituting of offence and the statement of the accused as provided for in the Code of Civil Procedure, 1973 (2 of 1974) forward the case to a Magistrate having jurisdiction to try the same and the Magistrate to whom any such case is forwarded shall proceed to hear the complaint against the accused as if the case has been forwarded to him under Section 346 of the Code of Criminal Procedure, 1973.
- (5) Every proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 and for purposes of Section 196, of the Indian Penal Code (45 of 1960), and the Commission shall be deemed to be a Civil Court for the purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

14. Investigation.-

- (1) The Commission may for the purpose of conducting any investigation pertaining to the inquiry, utilize the services of any officer, investigation agency of the Central Government or any State Government with the concurrence of the Central Government or the State Government, as the case may be.
- (2) For the purpose of investigation into any matter pertaining to the inquiry, any officer or agency whose services are utilized under sub-section (1) may, subject to the direction and control of the Commission,-
 - (a) summon and enforce the attendance of any person and examine him;
 - (b) require the discovery and production of any document; and
 - (c) requisition any public record or copy thereof from any office.
- (3) The provisions of Section 15 shall apply in relation to any statement made by a person before any officer, agency whose services are utilized under sub-section (1) as they apply in relation to any statement made by a person in the course of giving evidence before the Commission.
- (4) The officer or agency whose services are utilized under sub-section (1) shall investigate into any matter pertaining to the inquiry and submit a report thereon to the Commission within such period as may be specified by the Commission in this behalf.
- (5) The Commission shall satisfy itself about the correctness of the facts stated and the conclusion, if any, arrived at in the report submitted to it under sub-section (4) and for this purpose the Commission may make such inquiry (including the

examination of the person or persons who conducted or assisted in the investigation) as it thinks fit.

15. Statement made by persons to the Commission.-

No statement made by a person in the course of giving evidence before the Commission shall subject him to, or be used against him in, any civil or criminal proceeding except a prosecution for giving false evidence by such statement::

Provided that the statement:-

- (a) is made in reply to the question which he is required by the Commission to answer; or
- (b) is relevant to the subject-matter of the inquiry.

16. Persons likely to be prejudicially affected to be heard.-

If, at any stage of the inquiry, the Commission,-

- (a) considers it necessary to inquire into the conduct of any person; or
- (b) is of the opinion that the reputation of any person is likely to be prejudicially affected by the inquiry,

it shall give to that person a reasonable opportunity of being heard in the inquiry and to produce evidence in his defence:

Provided that nothing in this section apply where the credit of a witness is being impeached.

CHAPTER - IV

PROCEDURE

17. Inquiry into complaints.-

The Commission while inquiring into the complaints of violations of human rights may-

- (i) call for information or report from the Central Government or any State Government or any other authority or organization subordinate thereto within such time as may be specified by it:

Provided that -

- (a) if the information or report is not received within the time stipulated by the Commission, it may proceed to inquire into the complaint on its own;
- (b) if, on receipt of information or report, the Commission is satisfied either that no further inquiry is required or that the required action has been initiated or taken by the concerned Government or authority, it may not proceed with the complaint and inform the complaint accordingly;
- (ii) without prejudice to anything contained in Clause (I), if it considers necessary, having regard to the nature of the complaint, initiate an inquiry.

18. Steps after inquiry.-

The Commission may take any of the following steps upon the completion of an inquiry held under this Act, namely:-

- (1) where the inquiry discloses, the Commission of violation of human rights, or negligence in the prevention of violation of human rights by a public servant, it may recommend to the concerned Government or authority the initiation of proceedings for prosecution or such other action as the Commission may deem fit, against the concerned person or persons;
- (2) approach the Supreme Court or the High Court concerned for such directions, orders or writs as that Court may deem necessary;

- (3) recommended to the concerned Government or authority for the grant of such immediate interim relief to the victim or the members of his family as the Commission may consider necessary;
- (4) subject to the provisions of clause (5) provide copy of the inquiry report to the petitioner or his representative;
- (5) the Commission shall send a copy of its inquiry report together with its recommendations to the concerned Government or authority and the concerned Government or authority shall, within a period of one month, or such further time as the Commission may allow, forward its comments on the report, including the action taken or proposed to be taken thereon, to the Commission;
- (6) the Commission shall publish its inquiry report together with the comments of the concerned Government or authority, if any, and the action on the recommendations of the Commission.

19. Procedure with respect to armed forces.-

- (1) Notwithstanding anything contained in this Act, while dealing with complaints of violation of human rights by members of the armed forces, the Commission shall adopt the following procedure, namely:-
 - (a) it may, either on its own motion or on receipt of a petition, seek a report from the Central Government;
 - (b) after the receipt of the report, it may either not proceed with the complaint or as the case may be, make its recommendations to that Government.
- (2) The Central Government shall inform the Commission of the action on the recommendations within three months or such further time as the Commission may allow.

(3) The Commission shall publish its report together with its recommendations made to the Central Government and the action taken by that Government on such recommendations.

(4) The Commission shall provide a copy of the report published under sub-section (3) to the petitioner or his representative.

20. Annual and special reports of the Commission.-

(1) The Commission shall submit an annual report to the Central Government and to the State Government concerned and may at any time submit special reports on any matter, which in its opinion, is of such urgency of importance that it should not be deferred till submission of the annual report.

(2) The Central Government and the State Government, as the case may be, shall cause the annual and special reports of the Commission to be laid before each House of Parliament or the State Legislature respectively, as the case may be, along with a memorandum of action taken or proposed to be taken on the recommendations of the Commission and the reasons for non-acceptance of the recommendations, if any.

CHAPTER - V

STATE HUMAN RIGHTS COMMISSIONS

21. Constitution of State Human Rights Commissions.-

(1) A State Government may constitute a body to be known as the (name of the State) Human Rights Commission to exercise the powers conferred upon, and to perform the functions assigned to, a State Commission under this Chapter.

(2) The State Commission shall consists of –

- (a) a Chairperson who has been a Chief Justice of a High Court;
 - (b) one Member who is, or has been, a Judge of a High Court;
 - (c) one Member who is, or has been, a District Judge in that State;
 - (d) two members to be appointed from amongst persons having knowledge of, or practical experience in, matters relating to human rights.
- (3) There shall be a Secretary who shall be the Chief Executive Officer of the State Commission and shall exercise such powers and discharge such functions of the State Commission as it may delegate to him.
- (4) The headquarters of the State Commission shall be at such place as the State Government may, by notification specify.
- (5) A State Commission may inquire into violation of human rights only in respect of matters relatable to any of the entries enumerated in List II and List III in the Seventh Schedule to the Constitution:

Provided that if any such matter is already being inquired into by the Commission or any other Commission duly constituted under any law for the time being in force, the State Commission shall not inquire into the said matter:

Provided further that in relation to the Jammu and Kashmir Human Rights Commission, this sub-section shall have effect as if that for the words and figures “List II and List III in the Seventh Schedule to the Constitution”, the words and figures “List III in the Seventh Schedule to the Constitution as applicable to the State of Jammu and Kashmir and in respect of matters in relation to which the Legislature of that State has power to make laws” had been *substituted*.

22. Appointment of Chairperson and other Members of State Commission.-

- (1) The Chairperson and other Members shall be appointed by the Governor by warrant under his hand and seal :

Provided that every appointment under this sub-section shall be made after obtaining the recommendation of a Committee consisting of.-

- | | |
|-------------------------------------------------------------------|----------------|
| (a) the Chief Minister | - Chairperson; |
| (b) Speaker of the Legislative Assembly | - Member; |
| (c) Minister in charge of the Department of Home
in that State | - Member; |
| (d) Leader of the Opposition in the Legislative
Assembly | - Member; |

Provided further that where there is a Legislative Council in a State, the Chairman of that Council and the leader of the opposition in that Council shall also be members of the Committee:

Provided that no sitting Judge of a High Court or a sitting district Judge shall be appointed except after consultation with the Chief Justice of the High Court of the concerned State.

- (2) No appointment of a Chairperson or a Member of the State Commission shall be invalid merely by reason of any vacancy in the Committee.

23. Removal of a Member of the State Commission.-

- (1) Subject to the provisions of sub-section (2), the Chairperson or any other Member of the State Commission shall only be removed from his office by order of the President on the ground of proved misbehaviour or incapacity after the Supreme Court, on a reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed in that behalf by the Supreme Court, reported that the Chairperson or such other Member, as the case may be, ought on any such ground to be removed.
- (2) Notwithstanding anything in sub-section (1), the President may by order remove from office the Chairperson or any other Member if the Chairperson or such other Member, as the case may be,-
 - (a) is adjudged an insolvent; or
 - (b) engages during his term of office in any paid employment outside the duties of his office; or
 - (c) is, unfit to continue in office by reason of infirmity of mind or body; or
 - (d) is of unsound mind and stands so declared by a competent Court; or
 - (e) is convicted and sentenced to imprisonment for an offence which in the opinion of the President involves moral turpitude.

24. Term of office of Members of the State Commission.-

- (1) A person appointed as Chairperson shall hold office for term of five years from the date on which he enters upon his office or until he attains the age of seventy years, whichever is earlier.

- (2) A person appointed as a Member shall hold office for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointed for another term of five years.

Provided that no member shall hold office after he has attained the age of seventy years.

- (3) On ceasing to hold office, a Chairperson or a Member shall be ineligible for further employment under the Government of a State or under the Government of India.

25. Member to act as Chairperson or to discharge his functions in certain circumstances.-

- (1) In the event of the occurrence of any vacancy in the office of the Chairperson by reason of high death, resignation or otherwise the Governor may, by notification, authorize one of the Members to act as the Chairperson until the appointment of a new Chairperson to fill such vacancy.
- (2) When the Chairperson is unable to discharge his functions owing to absence on leave or otherwise, such one of the Members as the Governor may, by notification, authorize in this behalf, shall discharge the functions of the Chairperson until the date on which the Chairperson resumes his duties.

26. Terms and conditions of service of Members of the State Commission.-

The salaries and allowances payable to, and other terms and conditions of service of, the Members shall be such as may be prescribed by the State Government;

Provided that neither the salary and allowances nor the other terms and conditions of service of Member shall be varied to his disadvantage after his appointment.

27. Officers and other staff of the State Commission.-

- (1) The State Government shall make available to the Commission-
 - (a) an officer not below the rank of a Secretary to the State Government who shall be the State Commission; and
 - (b) such police and investigative staff under an officer not below the rank of an Inspector-General of Police and such other officers and staff as may be necessary for the efficient performance of the functions of the State Commission.
- (2) Subject to such rule as may be made by the State Commission in this behalf, the State Government may appoint such other administration, technical and scientific staff as it may consider necessary.
- (3) The salaries, allowances and conditions of service of the officers and other staff appointed under sub-section (2) shall be such as may be prescribed by the State Government.

28. Annual and special reports of State Commission.-

- (1) The State Commission shall submit an annual report to the State Government and may at any time submit special reports on any matter which in its opinion, is of such urgency or importance that it should not be deferred till submission of the annual report.
- (2) The State Government shall cause the annual and special reports of the State Commission to be laid before each house of State Legislature where it consists of two houses, or where

such Legislature consists of one House, before that House alongwith a memorandum of action taken or proposed to be taken on the recommendations of the State Commission and the reasons for non-acceptance of the recommendations, if any.

29. Application of certain provisions relating to National Human Rights Commission to State Commission.-

The provisions of Sections 9, 10, 12, 13, 14, 15, 16, 17 and 18 shall apply to a State Commission and shall have effect, subject to the following modifications, namely:-

- (a) references to "Commission" shall be construed as reference to "State Commission" ;
- (b) in Section 10, in Sub-section (3), for the word "Secretary-General", the word "Secretary" shall be *substituted*;
- (c) in Section 12, clause (f) shall be *omitted* ;
- (d) in Section 17, in clause (i), the words "Central Government or any" shall be *omitted*.

CHAPTER - VI

HUMAN RIGHTS COURTS

30. Human Rights Courts. -

For the purpose of providing for speedy trial of offences arising out of violation of human rights, the State Government may, with the concurrence of the Chief Justice of the High Court, by notification, specify for each district a Court of Sessions to be a Human Rights Court to try the said offences;

Provided that nothing in this section shall apply if-

- (a) a Court of Session is already specified as a special Court; or
- (b) a special Court is already constituted,

for such offences under any other law for the time being in force.

31. Special Public Prosecutor.-

For every Human Rights Court, the State Government shall, by notification, specify a Public Prosecutor or appoint an advocate who has been in practice as an advocate for not less than seven years, as a Special Public Prosecutor for the purpose of conducting cases in that Court.

CHAPTER - VII

FINANCE, ACCOUNTS AND AUDIT

32. Grants by the Central Government.-

- (1) The Central Government shall, after due appropriation made by Parliament by law in this behalf, pay to the Commission by way of grants such sums of money as the Central Government may think fit for being utilized for the purposes of this Act.
- (2) The Commission may spend such sums as it thinks fit for performing the functions under this Act, and such sums shall be treated as expenditure payable out of the grants referred to in sub-section (1).

33. Grant by the State Government.-

- (1) The State Government shall, after due appropriation made by Legislature by law in this behalf, pay to the State Commission

by way of grants such sums of money as the State Government may think fit for being utilized for the purposes of this Act.

- (2) The State Commission may spend such sums as it thinks fit for performing the functions under Chapter V, and such sums shall be treated as expenditure payable out of the grants referred to in sub-section (1).

34. Accounts and audit.-

- (1) The Commission shall maintain proper accounts and other relevant records and prepare an annual statement of accounts in such form as may be prescribed by the Central Government in consultations with the Comptroller and Auditor-General of India.
- (2) The accounts of the Commission shall be audited by the Comptroller and Auditor-General at such intervals as may be specified by him and any expenditure incurred in connection with such audit shall be payable by the Commission to the Comptroller and Auditor-General.
- (3) The Comptroller and Auditor-General and any person appointed by him in connection with audit of the accounts of the Commission under this Act shall have the same rights and privileges and the authority in connection with such audit as the Comptroller and Auditor-General generally has in connection with the audit of Government accounts and, in particular, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect any of the offences of the Commission.
- (4) The accounts of the Commission, as certified by the Comptroller and Auditor-General or any other person appointed by him in this behalf, together with the audit report thereon shall be forwarded annually to the Central Government

by the Commission and the Central Government shall cause the audit report to be laid, as soon as may be, after it is received, before each House of Parliament.

35. Accounts and audit of State Commission.

- (1) The State Commission shall maintain proper account and other relevant records and prepare an annual statement of accounts in such form as may be prescribed by the State Government in consultation with the Comptroller and Auditor-General of India.
- (2) The accounts of the State Commission shall be audited by the Comptroller and Auditor-General at such intervals as may be specified by him and any expenditure incurred in connection with such audit shall be payable by the State Commission to be Comptroller and Auditor-General.
- (3) The Comptroller and Auditor-General and any person appointed by him in connection with audit of the accounts of the State Commission under this Act shall have the same rights and privileges and the authority in connection with such audit as the Comptroller and Auditor-General generally has in connection with the audit of Government accounts and, in particular, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect any of the offices of the State Commission.
- (4) The accounts of the State Commission, as certified by the Comptroller and Auditor-General or any other person appointed by him in this behalf, together with the audit report thereon shall be forwarded annually to the State Government by the State Commission and the State Government shall cause the audit report to be laid, as soon as may be, after it is received, before the State Legislature.

CHAPTER - VIII

MISECELLANEOUS

36. Matters not subject to jurisdiction of the Commission.-

- (1) The Commission shall not inquire into any matter, which is pending before a State Commission, or any other Commission only duly constituted under any law for the time being in force.
- (2) The Commission or the State Commission shall not inquire into any matter after the expiry of one year from the date on which the act constituting violation of human rights is alleged to have been committed.

37. Constitution of special investigation teams.-

Notwithstanding anything contained in any other law for the time being in force, where the Government considers it necessary so to do, it may constitute one or more special investigation teams, consisting of such police officers as it thinks necessary for purposes of investigation and prosecution of offences arising out of violations of human rights,.

38. Protection of action taken in good faith.-

No suit or other legal proceedings shall lie against the Central Government, State Government, Commission, State Commission or any Member thereof or any person acting under the direction either of the Central Government, State Government, Commission or the State Commission in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rule or any order made thereunder or in respect of the publication by or under the authority of the Central Government, State Government, the Commission or the State Commission of any report, paper or proceedings.

39. Members and officers to be public servants.-

Every Member of the Commission, State Commission and every officer appointed or authorized by the Commission or the State Commission to exercise functions under this Commission shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code (45 of 1860).

40. Power of Central Government to make rules.-

(1) The Central Government may, by notification, make rule to carry out the provisions of this Act.

(2) In particulars and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

(a) the salaries and allowances and other terms and conditions of service of the Members under Section 8;

(b) the conditions subject to which other administrative, technical and scientific staff may be appointed by the Commission and the salaries and allowances of officers and other staff under sub-section (3) of the Section 11;

(c) any other power of a civil Court required to be prescribed under clause (f) of sub-section (1) of Section 13;

(d) the form in which the annual statement of accounts is to be prepared by the Commission under sub-section (1) of Section 34; and

(e) any other matter which has to be, or may be, prescribed.

(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each house of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in, two or more successive sessions, and if,

before the expiry of the session immediately following the session or the successive sessions aforesaid, both House agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

41. Power of State Government to make rules.-

- (1) The State Government may, by notification, make rules to carry out the provisions of this Act.
- (2) In particulars and without prejudice to the generality of the foregoing power such rules may provide for all or any of the following matters, namely:-
 - (a) the salaries and allowances and other terms and condition of service of the Members under Section 26;
 - (b) the conditions subject to which other administrative, technical and scientific staff may be appointed by the State Commission and the salaries and allowances of officers and other staff under sub-section (3) of Section 27;
 - (c) the form in which the annual statement of accounts is to be prepared under sub-section (1) of Section 35.
- (3) Every rule made by the State Government under this section shall be laid, as soon as may be after it is made, before each House of the State legislature where is consists of two Houses, or where such Legislature consists of one House, before that House.

42. Power to remove difficulties.-

- (1) If any difficult arise in giving effect to the provision of this Act, the Central Government may, by order published in the official

Gazette, make such provisions, not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for removing the difficult:

Provided that no such order shall be made after the expiry of the period of two years from the date of commencement of this Act.

- (2) Every order made under this section shall, as soon as may be after it is made, be laid before each House of Parliament.

43. Repeal and Savings.-

- (1) The Protection of Human Rights Ordinance, 1993 (Ord.30 of 1993) is hereby repealed.
- (2) Notwithstanding such repeal, anything done or any action taken under the said Ordinance, shall be deemed to have been done or taken under the corresponding provisions of this Act.

APPENDICE – II

UNIVERSAL DECLARATION OF HUMAN RIHTS (1948)

Preamble:

Where as recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom ; justice and peace in the world.

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

Whereas it is essential to promote the development of friendly relations between nations.

Whereas the peoples of United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge.

Now, therefore,

The General Assembly,

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, properly, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and security of person.

Article 4

No one shall be held in slavery or servitude ; slavery and slave trade shall be prohibited in all their forms.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subject to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and

reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13

Everyone has the right to freedom of movement and residence within the borders of each State.

Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

Everyone has the right to seek and to enjoy in other countries asylum from persecution.

This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

Everyone has the right to a nationality.

No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family.

They are entitled to equal rights as to marriage, during marriage and at its dissolution.

Marriage shall be entered into only with the free and full consent of the intending spouses.

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17

Everyone has the right to own property alone as well as in association with others.

No one shall be arbitrarily deprived of his property.

Article 18

Everyone has the right to freedom of thought, conscience and religion, this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in such or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

Everyone has the right to freedom of peaceful assemble and association.

No one may be compelled to belong to an association.

Article 21

Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

Everyone has the right to equal access to public service in his country.

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

Everyone, without any discrimination, has the right to equal pay for equal work.

Article 20

Everyone has the right to freedom of peaceful assemble and association.

No one may be compelled to belong to an association.

Article 21

Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

Everyone has the right to equal access to public service in his country.

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

Everyone, without any discrimination, has the right to equal pay for equal work.

Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social service, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and profession education shall be made generally

available and higher education shall be equally accessible to all on the basis of merit.

Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious group, and shall further activities of the United Nations for the maintenance of peace.

Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27

Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29

Everyone has duties to the community in which along the free and full development of his personality is possible.

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

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QUESTIONNAIRE

(1) Are you aware of the female foeticide taking place in India?

Yes/No

(2) Do you justify the Phenomenon ?

Yes/No

(3) According to you what is the main cause for female foeticide ?

[a] Poverty [b] Dowry

[c] Girl Child is considered as a burden

[d] Pressure from family viz. (i) Husband, (ii) In-laws,
(iii) Parents, (iv) Relatives

[e] Social and Cultural convictions

[f] Any other reason

(4) Have you ever come across any incidence of female foeticide ? If yes, specify ?

Yes/No

(5) Do you feel that the women also contribute to commission of female foeticide ?

Yes/No

(6) Do you prefer a male child over female child ?

Yes/No

(7) If you prefer a male child, specify the reason:

i) Son is required to preserve the traditions and values of family.

ii) Son will provide you with old age support.

iii) Bringing up a male child is easier and economic.

iv) Daughter is a burden both socially and economically.

v) Any other reason.

(8) Do you like to have a female child ?

Yes/No

(9) Do you wish to have a female as your first child ?

Yes/No

(10) Are you aware of the methods of sex-determination?

Yes/No

(11) Are you aware of the genetic centers ?

Yes/No

(12) Do you think that large scale abortions are taking place to eliminate female foetus ?

Yes/No

(13) Do you know that abortions affect the health of women ?

Yes/No

(14) Do you think that Genetic Centres maintain the secrecy as to the sex of foetus ?

(15) Do you feel that these genetic centers also do assistance for abortions ?

Yes/No

(16) Do you feel that reasons given for abortions are not often genuine ?

Yes/No

(17) Do you feel that these centres are effectively supervised so as to check female foeticide ?

Yes/No

(18) Do you suggest any reforms in the existing Law ?, If so specify.

(19) Do you think that better education to females will improve the situation ?

Yes/No

(20) Whether the work of women organizations are effective ?

Yes/No

(21) Do you feel that raise in the economic conditions of women will improve the situation ?

(22) Do you feel that existing laws sufficient and effective to stop atrocities against women ?

Yes/No

(23) If no, give reason.

(24) Do you know about the declining (male-female) sex ratio ?

(25) According to you, what is the reason for declining sex ratio.

(i) Female foeticide (ii) Female infanticide

(iii) Son preference (iv) Any other reason

(26) What is the solution for this problem ?

(27) Do you think that female foeticide is a method of balancing family and controlling population ?

Yes/No

(28) Do you think that it is better to kill in the womb than to be ill-treated later ?

Yes/No

(29) Do you agree with the view that the declining sex ratio and scarcity of women will improve their position in the Society ?

Yes/No

(30) Do you agree with the view that the advent of technology is responsible for female foeticide ?

Yes/No

(31) Do you agree about the 33% reservation for women in Legislative Assembly ?

Yes/No

- (32) Do you agree that through political 'empowerment of women' there will be some solutions to these problems like ff, female infanticides and atrocities against women ?

Yes/No

- (33) Do you know that pre-natal sex determination tests have certain complications and risks as bleeding, spontaneous abortion, introduction of infection and anemia ?

Yes/No

- (34) Do you agree with the view that government should make this a cognizable offence ?

Yes/No

- (35) Do you think that media can generate awareness among the masses and sensitize them for future action oriented work on this issue ?

Yes/No

- (36) Do you agree that "Selective Killing" should be stopped ?

Yes/No

- (37) Do you think that by making rules and imposing punishment will eradicate this problem ?

Yes/No

- (38) Do you agree that adoption rules should be changed and girls should be given preference to boys ?

Yes/No

- (39) If you adopt a child whether you will prefer a girl or boy ?

Girl / Boy

- (40) Do you agree that the existing law needs amendments ?

Yes/No

- (41) Do you agree that a change in mindsets a solution to curb female foeticide ?

Yes/No

(42) Do you agree that NGO's can play a very vital role in spreading awareness about this issue ?

Yes/No

(43) Do you agree with the view that Doctors play a vital role in this aspect ? (i.e. money-minded)

Yes/No

(44) Whether free education should be given to the girls?

Yes/No

(45) Do you agree with the statement Ultrasound Clinics should be only meant to determine the health of the foetus and not for sex-determination of the unborn child ?

Yes/No

(46) Being a woman have you faced any type of harassment from any males ? (Answer only if you are a woman)

Yes/No

(47) If yes, please mention what type of harassment ?

(48) Are you aware of Human Rights ?

Yes/No

(49) Do you agree to the view that all rights of women are human rights ?

Yes/No

(50) Do you feel 'female foeticide' is a violation of human right ?

Yes/No

(51) Are you aware of the existing laws ? (The PNDT - MTF etc)

Yes/No

(52) What is your opinion of Uniform Civil Code

Necessary / Not Necessary

(53) Being a woman have you ever felt that you should not have a girl child ? (Answer only if you are woman)

Yes/No

(54) If yes, please mention the reason ?

- (a) Because, what problems you had to face your daughter should not face.
- (b) Because of fear and insecurity.
- (c) Because of the increasing number of crimes against women.
- (d) Dowry and Marriage expenses
- (e) Any other reasons.